Supreme Court, U.S.
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No.:

IN THE

Supreme Court of the United States

WILLIAM KYLE, KATHRYN GILBERT, AND MARY KYLE,

Petitioners,

v.

HON. GERALD LEBOVITS, (JHC), AND 736 RIVERSIDE DR., LLC.,

Respondents.

On Petition for a Writ of Certiorari To the State of New York Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is there a 14th Amendment minimum standard of judicial conduct for "actual bias" disqualification? Respondent Judge Lebovits refused to perform 15 statutory mandates governing New York City Housing Court disputes. When sued in mandamus, Respondent, *ex parte*, disparaged Petitioners' counsel to his adversary "as needing a psychiatrist," whose legal work is "crap [he] wouldn't wish on [his] worst enemy" and later threatened him with disciplinary charges. Admitting a "serious ethical conundrum," Respondent signed the Order dismissing the first mandamus against him,[1] then recused himself, but continued to conduct hearings. Post-recusal, Respondent accused Petitioners' counsel of "lying;" threw a court file at him and surrounded him with armed court officers "in case you get out of line." Petitioners filed this mandamus for disqualification, which was dismissed. The court then imposed sanctions on counsel. Did Respondent's post-recusal participation, his conduct and his failure to disqualify himself—despite abundant evidence of actual bias—violate the 14th Amendment.[2]

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[1] Respondent Judge was sued twice for mandamus. His actual bias became apparent after he was served with the first mandamus complaint. The second mandamus suit is the subject of this application.

[2] Pursuant to Rule 14-1(a), Petitioners also seek reversal of the sanctions imposed upon counsel, per 28 U.S.C. §2106.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, William Kyle, Kathryn Gilbert, and Mary Kyle, respectfully submit this petition for a writ of certiorari to review the judgment of the New York State Court of Appeals.

OPINIONS BELOW

The opinion of the Court of Appeals of New York is not yet published but is electronically available at WL 2871192. Pet. App. 1a. Respondent Judge Lebovits' initial order of recusal and subsequent order declining to disqualify himself are not reported.[1] *Id.* at 37a. The opinion of the New York State Supreme Court denying Petitioners' Mandamus petition for disqualification is electronically available at WL 3275204. *Id.* at 65a.

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[1] As discussed *infra*, (p.15), On June 20, 2007, Lebovits initially recused himself by writing on the file jacket: "I recuse myself." Pet. App. 121a – 123a, also see 41a *fn*.1. , immediately after Respondent Judge so-ordered a stipulation which terminated a mandamus action against him. Subsequently, Respondent Judge conducted at least two hearings and issued three decisions, all post-recusal. These orders denied Petitioners' motions for vacatur and disqualification. The post-recusal orders also accused Petitioners and their counsel of misconduct and scheduled a sanctions hearing. *Id.*, 12a, 17a, 28a. After recusing himself, Respondent issued an opinion finding attorney Kyle guilty of "trying to manipulate the system of justice in an egregious, unethical way," by bringing "a [mandamus] instead of appealing." *Id.*, 38-a.

And the opinion of the First Department of the Appellate Division affirming the Supreme Court's dismissal is electronically available at WL 3275204. *Id.* at 65a.

JURISDICTION

The State of New York Court of Appeals entered judgment on September 8, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a) and 28 U.S.C. §2106.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part: No State shall . . . deprive any person of life liberty or property without due process of law. . .
U.S. Cont. Amend. XIV, §1.

STATEMENT

This case involves a mandamus action for disqualification arising out of a New York City Housing Court dispute.[2] The underlying litigation

[2] Respondent Judge was sued twice in mandamus, his actual bias became apparent after he was served with the first which sought his compliance with requirements of New York's *Real Property and Procedural Law* (RPAPL §745[1]), mandating immediate trial on Petitioners' counterclaim. The second

stems from the uninhabitable conditions of Petitioners' apartment, located in the Harlem section of Manhattan in a building owned by their landlord, co-Respondent 736 Riverside Dr. LLC., ("Riverside"). Riverside—having lost multiple law suits to Petitioners between 1998 and 2005—was indebted to Petitioners for costs and attorneys fees. Under New York Law (Real Property Law ["RPL"] §234), those victories entitled Petitioners to a substantial counterclaim for *statutory* cost and fees in excess of $400,000.00. In 2006, Riverside filed yet another suit against Petitioners. Petitioners' verified counterclaim sought recovery of: "§234 attorneys' fees, costs and disbursements . . . retroactive to the date of incurrence."[3]

[Footnote continued from previous page]

mandamus suit, the necessity of which is explained within, is the subject of this application.

[3] RPL §234 provides in pertinent part:

> . . . there shall be implied in [a residential] lease a covenant by the landlord to pay the reasonable attorney's fees and/or expenses incurred by the tenants . . . in the *successful defense of any action commenced by the landlord against the tenant arising out of the lease*, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the landlord or *by way of counterclaim in any action* or summary proceeding commenced by the landlord against the tenant.

The facts are not in dispute. While presiding over this housing litigation, Respondent Judge violated 15 mandatory legislative enactments by erecting artificial procedures to prevent a trial on Petitioners' §234 counterclaim.[4] Respondent never denied his failure to comply with the 15 statutory mandates. To compel compliance with those provisions, Petitioners filed their first mandamus.

Three weeks after being served with the Mandamus Order to Show Cause, Respondent admitted his "serious ethical conundrum" and recused himself based upon the "strong feelings the [mandamus] engendered." Pet. App. 30a. Yet, after being served with the second mandamus petition (for retroactive disqualification), Respondent in effect, un-recused himself, by holding two hearings,[5] issuing three decisions, post recusal:[6]

THE COURT: *But I recused myself from [this] case.*

* * *

THE COURT: *. . . Okay. So now that I have recused myself, thank you very much. . . .*

MR. KYLE: *. . . Now if you have recused yourself, then I'm at a loss as to why we're having this colloquy. I mean if you've*

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[4] Pet. App. 3a - 9a

[5] *Id.*, 99a – 103a; 117a – 138a

[6] *Id.*, 12a, 17a, 28a.

recused yourself and—and you can't hear the matter any more—then why am I standing in front of you?

THE COURT: *Because—*

MR. KYLE: *—being essentially accused of "lying", being accused of being "slippery", and having files thrown at me? I don't understand this, Your Honor.*

THE COURT: *All right.* * * *

MR. KYLE: *So apparently you are proceeding on the case even though you have recused yourself, be cause I filed a Motion. Am I correct?*

THE COURT: *I get to ask the questions. You get to give the answers.*

Pet. App. 121a -122a.

The foregoing colloquy confirms Justice Thomas F. Liotti's conclusion that, "the system of recusal [in New York] is *deliberately* flawed because [its] judiciary wishes to discourage recusal motions by a process of *systemic intimidation* wherein it considers such motions to be a monkey wrench thrown into the works of its turnstile." Emphasis

added, *People v. T & C Design, Inc.*, 178 Misc.2d 971, 680 N.Y.S.2d 832, 1998 N.Y. Slip Op. 98641 (N.Y. Just. Ct., 1998). This "*deliberately* flawed process . . . of *systemic intimidation*" is as much in place today as when Justice Liotti lamented it in 1998. The public record of Respondent Judge Lebovits' uncontroverted bias, prejudicial and intemperate conduct culminating in near physical assault, has withstood four levels of judicial review.

Indeed, the penalty for having raised the issue has been the imposition of a $1000.00 sanction against the attorney seeking disqualification. The sanction was imposed, in an effort to "sting sufficiently," (Pet App. 58a), confirming the fears of Justice Liotti: to *discourage recusal motions by systemic intimidation. T & C Design, (supra)* at 975. These perfunctory "appellate" decisions prove Judge Lebovits' conduct—even if atypical—is overlooked, if not condoned by New York's recusal system. [7]

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[7] Recusal is the "trigger few trial lawyers ever want to pull. To state the obvious, a party risks offending or angering a judge by asking him to recuse himself, and a motion to recuse is rarely successful before the presiding judge or on appeal." *Litigation News: From the ABA Section of Litigation*: "Wrestling with the Judge Who Wants You to Settle" Campbell Killefer. Missouri State Supreme Court Judge Michael A. Wolff cautions: "If you don't kill the tiger, then you're going to have one angry tiger." Attorney Douglas T. Kendall warns: ". . . the clear risk of angering a judge outweighs the potential benefit of a successful recusal motion" *Legal Times* August 9, 2004 • Vol. XXVII, No. 32 "When Judges Behave Badly" [www. Legal times.com]. The *Courier Journal* observes: "If you ask them to step down and they don't, you probably have a hostile judge."

This case affords the Court an opportunity to determine whether the 14th Amendment establish a minimum standard of judicial conduct for actual bias disqualification. Resolution of this issue can re-affirm and clarify for the bench, the bar and broader body politic when such "systematic intimidation" violates due process or rises to the level of "deep-seated and unequivocal antagonism that would render fair judgment impossible." *Litekyv. United States*, 510 U.S. 540, 556 (1994). Anecdotal and scholarly opinion confirm that judicial antagonism and intimidation are *de rigueur* when an attorney seeks to disqualify a judge. This Court should clarify when such intimidation is beyond the pale of the Due Process Clause. This Petition presents the subsidiary question of whether post-recusal adjudication of substantive rights (i.e., vacatur) is unconstitutional per se.

Reversing the lower courts will restore due process to the underlying proceeding and reinvigorate the integrity of the judicial system. [8]

[Footnote continued from previous page]

Courier Journal On-Line "Is the Judge Biased?" "Ask the Attorney" Thomas W. McCutcheon.

[8] The perception that judges—for whatever reason—routinely accommodate more powerful interest is a cultural reality. "Most people—62 percent—believe there are two systems of justice, one for the rich and powerful, and one for everyone else." See American Bar Association "Speech Ideas/Talking Points: Independence of the Judiciary" @ http://www.abanet.org/. According to recent studies, public

Reversing the lower courts would further protect the public from impermissible judicial conduct when—for what ever reason—the state court recusal system fails or refuses to do so. Reversal would also signal this Court's absolute intolerance for egregious due process violations by the judiciary.

In the wake of *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, (2009), and prior Supreme Court precedent, this Court should reaffirm an unswerving commitment to the unbiased judicial resolution of disputes for every litigant. Deviations from the line of authority that runs from *Tumey v.*

[Footnote continued from previous page]

confidence in the judiciary is in a disturbing state of decline. See, *An Independent Judiciary*, Report of the ABA Commission on Separation of Powers & Judicial Independence (1997). In Gallup's 2007 annual "Honesty and Ethics of Professions Survey," school teachers and nurses ranked 83% and 74% respectively, whereas judges ranked 46% as having "high" ethical standards. [www.gallup.com/poll/1654/Honesty-Ethics-Professions.] Court of Appeals Judge Dolores Sloviter (3rd Cir.) cites a *National Law Journal* survey whose respondents when asked "which of the following groups played the largest role in protecting the individual rights of U.S. citizens?" only 11% answered judges. 10 *Western New England Law Review*, Vol. 10: 175 -176, citing 8 *National Law Journal*, Aug. 18, 1986, at S-3. In 1999, a national survey by the National Center for State Courts found that public trust and confidence in state courts lagged behind confidence ratings of other institutions. In an American Bar Association poll, only 32 percent of those responding said they were "extremely confident or very confident in judges." ABA, *Perceptions of the U.S. Justice System* (1999), reprinted in 62 *ALB. L. Rev*, 1307, 1320 (1999).

Ohio, 273 U.S. 510 (1927) through *Liteky v. U.S.*, 510 U.S. 540 (1994), cannot be tolerated, if the system of due process is to be credible and engender public confidence in the judiciary.

The judicial displays in this record far exceed "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, . . . sometimes display." *Liteky*, 114 S. Ct. at 1157.

In *Boston's Children First*, 244 F.3d 164 (1st Cir. 2001), Boston's Children successfully sought a writ of mandamus from the First Circuit Court of Appeals requiring District Judge Nancy Gertner's recusation premised on her *ex parte* comments to the media. Chief Judge Juan Torruella began by noting that "'if the question of whether §455(a) requires disqualification is a close one, the balance tips in favor of recusal.'" *Id.*, at 167. The chief judge went on to caution that the mandamus procedure presents "additional hurdles for the party seeking recusal. . . [and] thus requires 'a case not merely close to the line, but clearly over it.'" *Id.*

But Judge Gertner merely shared her doubts with *The Boston Herald* as to class certification in two school discrimination cases. In the one case, Judge Gertner felt: "'there was no issue as to whether [the plaintiffs] were injured . . . [Whereas] *this* is a more complex case.'" *Id.*, at 166. In stark contrast to Respondent's tirade of personal attacks,

Judge Gertner's speculative (albeit untoward) remarks and conduct pale by comparison.

Petitioners' initial mandamus was premised upon Respondent's failure to comply with 15 non-discretionary procedures established by the New York Legislature in Article 7 of the RPAPL, strictly regulating Housing Court "summary proceedings." Pet. App. 65a– 68a.[9] A stay of proceedings was issued by the New York Supreme Court upon filing of the first mandamus. Shortly after receiving the Stay of Proceedings,[10] Respondent scheduled and conducted an *ex parte* hearing with co- Respondent Riverside's counsel. *Id.* , 95a.

At this *ex-parte* hearing, Respondent characterized Petitioners' prior counsel: as "needing a psychiatrist" (*id.*, 98a); whose legal work is "crap" he "wouldn't wish . . . on [his] worst enemy" (*id.*, 99a); against whom Petitioners had "a good malpractice claim" (*id.*, 98); who is beneath speaking to "I wouldn't even—I wouldn't even speak to him off the record" (*id.*,); and someone to whom it was not worth reading "the Riot Act", "That's the sad part: Read the Riot Act to *him*?" (Emphasis added, *id.*) That this prejudicial broadside should have taken

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[9] Although only 14 rules cited at 65a through 68a, the fifteenth violation, in effect, subsumes them all: Respondent's refusal to follow RPAPL §745(1), mandating immediate trial on Petitioners' counterclaim. "All triable claims raised *shall* be tried." RPAPL §745(1).

[10] See Pet. App. at 115a.

place *ex parte* is no less alarming than its having afforded landlord's counsel considerable tactical and personal advantages *vis-à-vis* Petitioners' counsel.

Taken alone—or coupled with Respondent's subsequent threats to prior counsel with disciplinary retaliation if Petitioners' case is not "settled"—these judicial postures are constitutionally impermissible.[11] Symbiotically, they produce, as Petitioners argued below, quoting *Ward*, *supra*, a "'*situation* [i.e., 'circumstance'] in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) necessarily involves a lack of due process of law." *Id.*, 112a, , or "a clash in judicial roles," (*id.*, 140a, citing *Tumey and In re: Murchison*, 349 U.S. 133, (1955). Petitioners made similar arguments to the lower Appellate Division. App. 84a - 92a. (See also Petitioners' *Tumey* discussion in Reply to the Appellate Division for leave to appeal to Court of Appeals. *Id* ., 104a -105a.)

On July 24, 2006, Petitioners moved in housing court for summary judgment on their RPL §234, costs and attorney fees counterclaim. Respondent Judge conceded Petitioners met *all* factual and statutory requirements for RPL §§234/223 protection (*id.*, 7a), but denied statutory relief, holding instead: "A counterclaim must be

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[11] Post recusal, (for no apparent reason) Respondent also threatened Petitioners' counsel with a possible contempt charges. Pet App., 121a.

denominated as such. CPLR §3011." *Id.*, 8a.[12] And even though RPAPL §745(1) mandates immediate trial on "all triable issues *raised* [not denominated]", Respondent refused to send the §234 claim to trial. On Petitioners' motion for re-hearing, Respondent ruled Petitioners must "counterclaim clearly," (Pet. App., 10a), and refused to send the counterclaim to trial in violation of RPAPL §745(1).

New York has no such "*counterclaim clearly*" rule. So to protect their right to a trial on their §234 claim, Petitioners brought the initial mandamus to compel Respondent's performance of the duty imposed upon him by RPAPL §745(1)[13]: to send Petitioners' §234 claim ("counterclaim") to trial.[14]

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[12] Civil Practice Law & Rules ("CPLR") §3011 has no such requirement. It provides in part: "there shall be *a reply* to a counterclaim designated as such." Moreover, §3011 is inapplicable in Housing Court proceedings. Civil Court Act § 907 controls by virtue of CPLR §101. Neither statute requires a counterclaim to be "denominated as such". Pet. App. 65a – 68a.

[13] RPAPL §745(1) provides in part: "all triable issues *shall* be tried."

[14] The appropriateness of Mandamus in the context of landlord-tenant "summary proceedings" has been consistently upheld by the State of New York Court of Appeals. *Brusco v. Braun*, 84 N.Y.2d 674, 621 N.Y.S.2d 291, 645 N.E.2d 724 (N.Y. 1994); and *Mennella v. Lopez-Torres*, 91 N.Y.2d 474, 695 N.E.2d 703 (N.Y. 1998). Therefore, although the respondent judge in *Mennella*, argued, "the extraordinary remedy of mandamus is inappropriate," (*id.*, 833), New York's highest court issued the writ because Housing Court judges: lack the discretionary legal authority . . . to *fashion* . . . *an additional procedural safeguard*, as a matter of policy . . . beyond the policy choices made

After service of the mandamus Stay of proceedings ordering Respondent to show cause, instead of sending the counterclaim to trial or honoring the Stay, Respondent held an *ex parte* hearing informing Riverside's counsel: "I want to resolve this lawsuit [the Mandamus] as quickly as possible . . . I have *strong personal* reasons why I don't want to have a lawsuit pending against me." Respondent *ex parte* directed co-Respondent Riverside's counsel to "draft something up" to settle the suit against Respondent Judge and "the legal fees portion of [Petitioners] claim." *Id.*, 95a – 96a. [15]

Two weeks later, the stay was still in place and the matter not settled. Respondent then summoned Petitioners' prior counsel to attend additional hearings, warning him: "Judge Wendt[16] is not your biggest fan" and:

[Footnote continued from previous page]

by the Legislature." Cf., Respondent's ruling: "It is Law 101 that a lawyer does not file [a mandamus] instead of appealing." Pet. App., 36a.

[15] The Court should compare Respondent Judge's unabashed free ranging *ex parte* colloquy with co-Respondent's counsel with his absolute refusal to discuss anything, *ex parte* with Petitioners' counsel. See Pet. App. 135a.

[16] Judge Wendt was also a co-respondent in the first mandamus action. He was named as a co-Respondent for his refusal to order that Petitioners' counterclaim be given immediate trial. Pet. App. at 44a.

> It shocks my conscience to believe that you think that the way to gain leverage [by] suing me and [Judge] Wendt. And it shocks my conscience [that] instead of appealing [you] go to 60 Centre Street [State Supreme Court]. . . . And so I have instructed my attorney to go full blast defending me in the litigation at 60 Centre Street.

Finally, Respondent warned Petitioners' prior counsel:

> I think that your lawsuit is sanctionable. And I think that your lawsuit could lead you to go to the disciplinary committee. And I not—*were I not precisely a lit [litigant]* here, I would say that your lawsuit is so frivolous and so sanctionable that it shocks the conscience. Pet. App. 81a.[17]

Respondent further stated to Petitioners' prior counsel:

> . . . I have to speak to my attorney, uh, before I file disciplinary charges against

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[17] The "shocking," "immoral," and "frivolous," action taken by Petitioners' prior counsel was filing a mandamus action seeking to compel Respondent to conduct a trial on Petitioners' counterclaim, as required by New York State law. RPAPL 745(1).

> you, uh, what's going to happen with the [mandamus]'. . . that just begins the tip of the iceberg about my thoughts, because my thoughts continue on and on...I wonder, frankly, if you're capable of doing this, what else you're capable of. ... I don't trust you even a little bit. Okay, have you heard me loud and clear? *Id.*, 56a, *fn.*, 4 cont.

Fearing disciplinary charges, prior counsel entered into a settlement on the counterclaim costs and fees issue, as well as the prior mandamus. *Id* ., 148a, ¶9. Respondent was a named party to the stipulation which resolved the counterclaim and the mandamus filed against him. *Id.*, 146a.[18] On June 20, 2007, Respondent signed a stipulation which discontinued the mandamus against him and resolved the Petitioners' counterclaim. Immediately after signing the June 20, 2007, stipulation Respondent recused himself, by writing on the file jacket words to the effect "I recuse myself." *Id.*, 122a. With prior counsel removed, Petitioners moved *pro se* for disqualification of Respondent. Pet. App. 12a.

Even though Respondent recused himself on June 20, 2007, on July 8th, 2007, he decided Petition-

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[18] Petitioners' prior counsel was Ronald Hart, Esq. The stipulation provided in part for a payment to prior counsel by co-Respondent of $190,000.00 to withdraw from representing Petitioners *id.*, 148a ¶6, and ultimately resulted in a $23,000.00 judgment against Petitioners. The stipulation also discontinued the mandamus action against Respondent. *id.*, 148a ¶9.

rs' pro se motion for disqualification. Respondent simply wrote: "Denied—This document is the most outrageous document the Court has seen in its 5½ years of service on the bench." Pet. App. 12a. This mandamus action followed.

Below, sanctions were meted out against Petitioners' subsequent counsel for, *inter alia*, Petitioners' characterizing Respondent as having "[*in essence*] brought down the gavel in his own case" (*id.*, 4a). But the figure of speech was accurate.[19] Respondent declared his desire that the prior mandamus action be resolved "as soon as possible" for "*strong* personal reasons." Emphasis added, *id.*, 96a - 97a.

In the lower courts, Respondent successfully contended mandamus was inappropriate because Petitioners "have an adequate legal remedies by . . . vacatur . . . and may pursue an appeal if that relief is denied." *Id.*, 83a. Petitioners replied that the adequate-remedy-at-law defense is inapplicable when a party seeks compliance with a constitutional duty. *Engel v. Vitale*, 18 Misc.2d 659, 191 N.Y.S.2d 453 (N.Y. Sup. Ct., Kings Co., 1959) *Engel v. Vitale*, 370 U.S. 421, (1962). *Id.*, 84a – 92a. Judge Lebovits had a constitutional duty to disqualify himself, because:

---

[19] Using the prestige of his office and the weight of disciplinary threats against Petitioners' prior counsel, Respondent in effect coerced a withdrawal of prior counsel and a dismissal of Petitioners' cause of action against Respondent himself.

> . . . the Fourteenth Amendment "establishes a constitutional floor, not a uniform standard." *Bracy v. Gramley*, 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997). Nonetheless, "the floor established by the Due Process Clause clearly requires a 'fair tribunal," before a judge with no interest in the outcome of his particular case."

Id., 905. Pet. App. 91a.

The Appellate Division found no constitutional duty, holding Petitioners "had and have other adequate remedies at law by which to seek the retroactive disqualification of the judge." *Id.*, 63a. The panel also affirmed the hearing court's dismissal of Petitioners' bias claim, absolving Respondent Judge of all impartiality, citing *Alizia Mck.*, 25 AD3d 429 (N.Y., 2006), *id*, which held: "in this case there are no circumstances that would bring the court's impartiality into question." Pet. App. 110a - 111a.

Respondent's self-proclaimed "strong personal reasons" why he wanted the lawsuit against him resolved "as quickly as possible" are never addressed or even mentioned by the lower courts. Nor does the Appellate Division acknowledge the uncontroverted fact that Respondent Judge had indeed, recused himself and later un-recused himself immediately after so-ordering the stipulation, terminating the suit against him. Similarly unanalyzed are Respondent's other statements (discussed *infra*, pp.

18-24) which objectively manifest actual bias and consistent hostility.

Petitioners also urged Respondent's disciplinary threats violated due process of law. *Id.* 138 – 141a. Again they sought redress for constitutional deprivations under *Tumey v. Ohio*, 273 U.S. 510 (1927); *Murchison*; *Ward v. Village of Mon-roeville*, 409 U.S. 57 (1972), and *Aetna Life Ins. v. Lavoie*, 475 U.S. at 813 (1986). Pet. App., 107a – 113a; 141a – 142a. Petitioners' Court of Appeals application also argued that Respondent's conduct easily falls within *Caperton*'s "objective"/"substantial potential for bias" standard. Pet App. 107a. Respondent's conduct (measured objectively) created a "substantial probability of bias" (*id.*, 107a – 108a). The Court of Appeals rejected Petitioners' argument, but failed to consider objective standards requiring recusal. This result is "not consistent with the imperatives of due process." *Caperton*, 129 S. Ct. at 2265.

This Court has admonished that only "extreme cases are more likely to cross constitutional limits, requiring this Court's intervention and formulation of objective standards." *Caperton*, 129 S. Ct. at 2265. Petitioners respectfully submit that by *any* standard, the instant facts are extraordinary featuring not only the appearance of but actual bias. In at least three respects, the facts of this case violate 14th Amendment due process as identified by this Court's precedent from *Tumey* through *Caperton*:

First
Serial, Post-Recusal Adjudication.

After his June 20th, 2007, recusal (*id.*, 147a; *fn.* 31), Respondent subsequently *un*-recused himself, serially presiding over Petitioners' rights, issuing decisions and denying their applications at least three-times post-recusal. Respondent denied Petitioners' motions for disqualification and to vacate the stipulation. During the disqualification hearing, Respondent digressed to conduct a lengthy haranguing interrogation of Petitioner W. Kyle, regarding his legal education and, for reasons unknown, accused Petitioner W. Kyle of perjury. (7-9-07, *id.*, 99a – 103a):

THE COURT: I'm going to give you one chance to tell me the truth.

MR. KYLE: About what?

THE COURT: About your going to law school, about the bar exam, about your graduating, about the University of Detroit, about—um, about, um, Regions (sic) College.[20] And if you tell me the truth, I'm going to forget this whole episode. But if you don't tell me the truth, I'm going to look into it further.

---

[20] [sic.] Regent's College, London.

MR. KYLE: I think you should just "look into it further," except for dates.[21]

Respondent then in effect re-recused himself only to *un*-recuse himself and preside again. (8-13-07 *id.*, 124a – 125a). At this *second* post-recusal hearing Respondent accused Petitioners' new *counsel* of being "a liar" and "slippery" (*id.*, 37a, 42a, 53a), concluding this second post-recusal intervention by issuing two additional written decisions. Respondent scheduled a date upon which he would conduct an additional post-recusal hearing, to consider imposing monetary sanctions against Petitioners' new counsel. *Id.*, 27a. The basis for considering sanctions was Petitioners' counsel's motion to vacate the stipulation entered by Respondent, immediately prior to his June 20, 2007, recusal. *Id.*, 41a, *fn.*, 1

Respondent then apparently recused himself for a *third* time and then un-recused himself again (8-24-07), to withdraw the sanctions hearing, 62 days before—coincidently—Justice Cahn imposed sanctions, on October 26th, 2007. Respondent again recused himself but only after, *sua sponte* scheduling the case for trial on October 9th, 2007. *Id.*, 39a.[22]

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[21] Post-recusal, Judge Lebovits required W. Kyle to travel 90 minutes from lower Manhattan to Harlem to retrieve all of his educational documents demonstrating he was a law school graduate and attended Regent's College, in London. Pet. App., 101a – 103a.

[22] While some of Respondent's post recusal involvement was ministerial, most of it was not. Post recusal Respondent denied a motion to vacate the June 20, 2007, stipulation (to

Second

Respondent Admits Objective "Conflict" and "Serious Ethical Conundrum," Then Recuses Himself <u>After</u> Signing the Order Which Resolved the First Mandamus Lawsuit against Respondent

In *Caperton*, West Virginia Supreme Court of Appeals Justice Benjamin, ". . . indicated that he 'carefully considered the bases and accompanying exhibits proffered by the movants.' But he found 'no objective information . . . to show that this Justice . . . will be anything but fair and impartial.'" *Id.*, 556 U. S. ____ (2009) [p.13].

Compared to Justice Benjamin's methodology, Respondent Judge's remarks stand out in stark contrast:

> I'm in a *peculiar position* with all of this, I think, because . . . at the same time you have sued me. Uh, that—that, as far as I'm concerned, presents a rather *serious ethical conundrum* on my part because it's rare to be sued and still have a case pending before me . . . all at the same time. . .

[Footnote continued from previous page]

which he was a named Party [Pet. App. 146s]), that was signed by Respondent immediately before his initial recusal. Also post recusal Respondent denied a motion for his disqualification. *Id.*, 12 a.

Emphasis added; Pet. App. 74a.

Nothing remotely approaching this language is found in *Caperton*. In contrast to Justice Benjamin, Respondent Judge was so impressed by his own hostility (the "strong feelings engendered" [*id.*, 30a]) toward Petitioners, their attorneys "toward you and everything else" (*id.*, 59a), he recused himself. According to the lower court, Petitioners:

> . . . contend Judge Lebovits demonstrated bias and prejudice [by warning their counsel]: "Okay. What, now, Sir, are your thoughts in response to my obviously *pretty strong feelings toward you, toward your litigation* and everything else?"

Emphasis added, *id.*, 59a.

Based on that statement and the fact that Respondent was lawfully sued by Petitioners in the prior Mandamus, the motion court acknowledged that, objectively:

> Judge Lebovits correctly recognized, having been sued by the tenants in a mandamus proceeding, his impartiality towards those litigants might reasonably be questioned. Accordingly, he appropriately recused himself from the 2006 non-payment case. *Id.*, 76a.

The court's concession to the objective appearance of bias is no less impressive than Res-

pondent's: "The court . . . should recuse itself on the basis of *conflict* and because of the *strong feelings* that the [Mandamus] engendered." Emphasis added, Pet. App. 30a. In other words: "To eliminate the possibility of a conflict, the court recused itself." *Id.*, 35a. Respondent's disciplinary threats are his admission that he had a constitutional obligation to withdraw:

> . . . the statement "I am thinking about filing a disciplinary charge" was [not] meant to convey that this court would do so. The court made the statement to explain why it should recuse itself—and why it did recuse itself. *Id.*, 61a.

But the decision's glaring irony is its imposition sanctions (based on "Judge Lebovits [having already] made clear that he has recused himself . . ." [*id.*, 66a]), yet failing to mention Respondent's multiple post-recusal interventions. The lower courts completely failed to consider or even discuss the due process implications as to *pre-* and post-recusal disqualifying bias, notwithstanding the due process issues briefed by the parties. *Id.*, 1a – 61a, cf., 64a - 81a, 84a - 93a, 106a - 143a.

Third

Vituperative Conduct Directed Toward Petitioners' and their Counsel Objectively Proves Actual Disqualifying Bias

Respondent's having physically thrown the court file at Petitioners' new counsel, of course, confirms his lack of impartiality. *Id.*, 123a, 134a. Such an injudicious act occurring *post*-recusal, establishes conclusive actual bias. By the same token, Respondent's post-recusal decisions submitted in opposition to the disqualification mandamus (*id.*, 150a) are bereft of any jurisprudential weight whatsoever. Respondent's decisions are premised on non-existent facts, leveling accusations of conspiracy, theft, collusion and perjury against Petitioners and their prior counsel. The decisions underscore Respondent's deeply entrenched—not to say compulsive—bias. (See analysis made to the Court of Appeals at *id.*, 110a - 117a)

The lower courts' reading of the Due Process Clause under which this kind of judicial conduct passed constitutional muster, is nowhere apparent. Without legal analysis or reasoning, the Appellate Division found no constitutional violation and denied the retroactive disqualification. *Id.*, 61a.

Therefore, this Court should consider whether the judicial manifestations of open contempt and visceral hostility toward Petitioners, their successive

counsel and claims is constitutionally tolerable. More fundamentally, this Court may ponder whether Respondent's uniquely harsh and intemperate conduct moots any analysis under "*potential* for bias".

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to fulfill what Justice Kennedy has called "the promise of neutrality," [23] i.e., "central to . . . the idea of the rule of law [is] that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633 (1996). This Petition affords the Court an opportunity to reestablish the constitutional floor of unbiased judicial resolution of disputes. This Court should include in the realm of constitutionally-impermissible conduct, actual bias generated by a judge's reaction to a recusal motion. Such conduct has been analogized by scholars and judges as having "one angry tiger," if a recusal motion fails.[24]

Given this Court's holdings that actual bias is prohibited under the 14th Amendment, an important

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[23] Seattle Times, Dec, 1998.

[24] See *fn.*, 1, *supra*. Even if the recusal motion is not well founded, a judge's reaction to the motion may create circumstances where disqualification becomes necessary.

federal question here is whether post-recusal adjudication is *per se* unconstitutional. As noted by this Court, the judges' own inquiry into actual bias, is not one that the law can easily superintend or review. But actual bias if disclosed, undoubtedly forms a basis for relief. So, if actual bias is objectively demonstrated, the Due Process Clause requires disqualification.

I: RESPONDENT'S REFUSAL TO DISQUALIFY HIMSELF CONFLICTS WITH THIS COURT'S DUE PROCESS PRECEDENTS

There is now universal consensus that when "the risk that [circumstances] engendered actual bias is *sufficiently substantial* . . . it 'must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 556 U. S. ____ (2009) [p.15], citing *Withrow* v. *Larkin*, 421 U. S. 35, 47 (1975). Yet, historically, it was always the rule that such circumstances occur when the court and a litigant were "enmeshed in prior proceedings"—usually a proceeding prior to a contempt charge, but not exclusively so. *Johnson v. Mississippi*, 403 U.S. 212 (1971).

In this case, Petitioners sued Respondent in a prior mandamus action against which Respondent failed to articulate any conceivable defense. Pet. App. 64a – 68a. Similarly, in *Johnson, (supra)*, the judge had lost a civil rights suit to Johnson just prior to trying him for contempt. With no direct nexus between the prior civil rights action and the

contempt charge, the *Johnson* court was careful to focus on the "prior relationship" between the judge and litigant. The judge,

> . . . immediately prior to the adjudication of contempt was a defendant in one of petitioner's civil rights suits and a losing party at that. From that it is plain that he was *so enmeshed in matters involving petitioner* as to make it most appropriate for another judge to sit. Trial before 'an unbiased judge' is essential to due process.
>
> Emphasis added, *Johnson*, at 216.

Johnson's so-enmeshed-in-matters-involving petitioner became one of *Caperton's* "disqualifying criteria" in which "[c]ircumstances and relationships must be considered." (*Caperton* [*supra*], *citing Murchison*, [*supra*] at 2261). *Murchison* turned on "the judge's prior relationship with the party, as well as the information acquired from the prior proceeding" because both were of "critical import" (*id.*, 129 S.Ct. at 2262).

After *Murchison*, in *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), when a lawyer verbally assaulted a judge during a prior proceeding, this Court held that due process requires "contempt proceedings . . . before a judge other than the one reviled by the contemnor." *Caperton* "reiterated", that according to *Mayberry*, "[the] rule rests on the *relationship between the judge and the defendant*."

Emphasis added, *id.*, at 2255. In other words, "the circumstances of the case *and* the prior relationship required recusal. Under *Mayberry*, for due process purposes, "[a] judge, vilified as was the Pennsylvania judge, necessarily becomes embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication." *Mayberry*, at 465.

In *this* case, the bitter, running controversy, entailed "*insulting attack[s] upon . . . integrity,*" *but* came from the opposite direction: from bench to bar. Respondent directed harsh and "insulting attacks" toward Petitioners' and their attorneys. Indeed, Respondent Judge directed the same type of insults at Petitioners themselves, ultimately hurling "insulting attacks" at Petitioners' *new* counsel. *Mayberry*'s mirror image reflects a corollary principle: "No [*judge* who] so cruelly *slander[s]* is likely to [have] maintain[ed] that calm detachment necessary for fair adjudication." *Mayberry* at 465.

Below, co-Respondent Riverside argued "Judge Lebovits was not required to recuse himself from the housing court proceeding merely because petitioners-appellants had filed a separate [mandamus] petition . . . to hold otherwise would permit litigants to engineer recusal by bring [sic] mandamus proceedings against judges." But Petitioners never claimed disqualification premised on the mere filing of the prior Mandamus. They claimed the *circumstances* created by Respondent's visceral reaction to the first mandamus produced an

"inextricable relationship" with Petitioners. Citing Justice Brennan in *Ward*, Petitioners argued the relationship in this case created ". . . a '*situation* in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) necessarily involves a lack of due process of law (*Ward*., 409 U.S. at 60)." Pet. App., 112a.

Objective bias is further underscored by Respondent's striking at the very core of Petitioners' attorney-client relationship through disciplinary threats. A similar occurrence was relied on in the dissent in *Taylor v. Illinois*, 484 U.S. 400 (1988). *Taylor* upheld a preclusion sanction for an attorney's violation of discovery orders. In their dissent, Justice Brennan, along with Marshall and Blackmun, commented on an interrelated matter: the trial court's threat of disciplinary proceedings:

> . . . the defense attorney became noticeably timid once the judge threatened to report his actions to the disciplinary commission. He did not argue: "Sure, bring me before the disciplinary commission; that's a much more appropriate sanction than excluding a witness who might get my client acquitted." I cannot see how we can expect defense counsel in this *or any other case* to act as vigorous advocates for the interests of their clients when those interests are adverse to their own.
>
> Emphasis added, *id*., 437.

In other words such threats have the practical effect of disqualifying a litigant's attorney, by *de facto* judicial interference with the attorney-client relationship.

By analogy to disqualification under 28 U.S.C.A. §455(a), in *Liteky* (*supra*), Justice Kennedy observed §455(a) disqualification is "triggered by an attitude or state of mind so resistant to *fair and dispassionate inquiry* [yielding] reasonable grounds to question the neutral and objective character of a judge's rulings or findings." Accordingly, "a judge should be disqualified only if it appears that he or she *harbors an aversion, hostility or disposition of a kind* that a fair-minded person could not set aside when judging the dispute." *Id.*, 510 U.S. at 588.

On this record, the Court must conclude that no fair minded person who harbors an aversion, hostility or disposition such that he would openly state that Petitioners and/or their attorneys were guilty of fraud, conspiracy, theft, mental illness, immorality and contempt, could possibly set those feelings aside when judging this dispute. Pet. App.; 110a – 117a. Under these circumstances, due process requires disqualification, even by mandamus. But then, "few situations are more appropriate for Mandamus than a Judge's clearly wrongful refusal to disqualify himself." *In re I.B.M. Corp., In United States v. I.B.M. Corp.*, 618 F2d 923 (C.A. 2, 1980).

II. ENFORCEMENT OF THE SANCTIONS JUDGMENT IS MANIFESTLY UNCONSCIONABLE UNDER 28 U.S.C. §2106, BECAUSE THE SANCTIONS ARE PREDICATED ON SUBMISSION OF A DEMONSTRABLY FALSE AFFIDAVIT AND DISTORTIONS OF COUNSEL'S CONDUCT.

28 U.S.C. §2106 confirms this Court's power to set aside at any time any mandate which was procured by effecting a fraud on the court or which is "manifestly unconscionable." *Cord v. Smith*, 370 F.2d 418, 423 (9th Cir. 1966). This Court declared that the "deep rooted policy in favor of the repose of judgments" and the interest in finality, must yield to the overriding interest of "correcting injustices." In certain instances, such injustices are sufficiently gross to require a departure from rigid adherence to enforcement of a judgment, when enforcement of the judgment is "manifestly unconscionable." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944).

The totality of circumstances here confirms a "manifestly unconscionable" sanctions order. Petitioners inserted exclamation points in the transcript excerpts were where the audio reflected raised voices or where the language itself clearly lacked judicial temperament. Pet. App., 55a. In penalizing these allegations, the lower court relied upon the sworn statement of co-Respondent's counsel, submitted in support of the landlord's cross-motion for sanctions: "As stated in the affidavit of Lawrence McCourt Esq., counsel for Riverside, Judge

Lebovits never raised his voice and conducted himself in a calm and judicious manner at *all* times." Emphasis added, Pet. App. 55a – 57a.

Mr. McCourt was able to exploit this false generalization in support of Riverside's cross-motion for sanctions because Petitioners had not yet received transcripts of the June 4, 2007, *ex parte* proceeding. In that *ex parte* proceeding, Respondent Judge casts disparaging remarks about Petitioners' counsel. Mr. McCourt submitted his affidavit even though he was singularly privy to Respondent's injudicious, invective and insulting personal attacks about Petitioners' prior counsel, behind his back. Based, in part, on that supporting affidavit, sanctions were imposed. *Supra*, at 48 - 60a.[25]

In a truly inexplicable turn, the motion court also rested the sanctions upon Petitioners alleging Respondent "coerced an unfair settlement . . . by threatening their former attorney" but failed "to submit[ ] an affidavit from their prior counsel in support of their application. . . and failed to explain why." Pet. App. 53a. In reality, however, not one but *two* sworn statements from prior counsel were submitted. Both statements were contained in sworn answers by Petitioners' prior counsel, in Petitioners' collateral tort action against their prior attorney claiming breach of fiduciary duty. *Id.*, 148a, ¶2. In both answers, prior counsel admitted:

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[25] While only four pages of the dismissal analyze the merits (*id.*, 43a – 47a), over twice that amount, roughly 12 pages, are dedicated to meting out sanctions. *Id.*, 48a – 60a.

> Based on the threats made against this Defendant by Judge Lebovits, said threats constrained the will of the threatened party, this Defendant, beginning in the first week of June 2007, increasing and culminating on June 15, 2007. [¶80].

Prior counsel's Verified Answer went on to suggest clear additional ex parte communication between Judge Lebovits and Riverside's counsel: namely that he was warned by Larry McCourt that:

> Judge Lebovits and Wendt said [they] would seek sanctions against [me] for filing the [Mandamus against them] in Supreme Court." (¶ 33).

When the court imposed sanctions for "petitioners' obvious intent to delay" (*id.*, 59a), it cited no evidence of such delay. See *id* ., 50a – 59a. The record confirms, however, that it was *co-Respondent Riverside* who sought delay as Petitioners stood ready for trial (*id.*, 134a – 135a).

The sanctions order is clearly results-driven as it, ironically, "truncates" Petitioners' words to create a pretext to impose sanctions for "truncating." *Id.*, 55a. The order finds "Mr. Kyle accuses Judge Lebovits of . . . selling tenants' statutory protections" (*id*). But Petitioners' actual words were: "Judge Lebovits *presides over the* selling of tenants' statu-

tory protections."[26] In short, ". . . the words used in the motions were in plain English, in no way offensive in themselves, and wholly appropriate to charge bias in the community and bias of the presiding judge." *Holt v. Virginia*, 381 U.S. 131 (1965).

The spirit of the "fraud on the court" rule is applicable whenever the integrity of the judicial process or functioning has been undercut, certainly in any instance of misconduct by a party. *Shotwell Mfg. Co., v. United States*, 371 U.S. 341 (1963). A court may not sanction "factual misrepresentations" (*id.*, 59a) when none are cited. This is especially so when the only factually-incorrect assertions entered into the record were by Respondent. These factually erroneous assertions by Respondent Judge are irrefutably documented. (*Id.*, 115a – 116a). Indeed, two crucial assertions (both of which contributed to the imposition of sanctions), were later withdrawn by the New York Attorney General. *Id.*, 93a. Respondent Judge's allegation that Petitioners never moved for rehearing was wrong; and, Respondent Judge's statement that Petitioners commenced their mandamus action "more than a year after the second of those orders was issued," was equally wrong. *Id.*, 93a - 94a.

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[26] A catalogue of similar distortions of the record is contained in Petitioners' Appellate Brief (at *id.*, 69a – 79a) not one of which was ever denied by the lower courts, co-Respondent Riverside nor Respondent Judge.

Yet the sanctions order is forthrightly based on this factual inaccuracy intentionally placed in the record:

> Judge Lebovits stated on the record that, in his opinion, petitioners' decision to file a [mandamus] against him and Judge Wendt, rather than moving for reconsideration of
>
> the orders or the filing of an appeal, was "frivolous and so sanctionable that it shocks the conscience." *Id.*, 45a.

In contrast to Judge Lebovits' allegations (withdrawn for lack of factual foundation), Petitioners' *sanctioned* statements have been essentially admitted by Respondents, and were never withdrawn.[27]

Petitioners also presented a detailed analysis to the Appellate Division of Riverside's affidavits and

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[27] Other erroneous allegations were not withdrawn by Respondents even after sanctions were imposed. Petitioners had claimed Respondent violated the Supreme Court stay by conducting hearings after the stay was imposed. Justice Cahn then imposed sanctions believing Respondent Judge's contention that he "was not aware of the Supreme Court stay." Pet. App. 49a. But, on June 4, 2007, Riverside's counsel directly *informed* Respondent of the Stay of proceedings. *Id.*, 95a. See also, Petitioner's proof of Respondent's awareness, *id.*, 114a (bottom) - 115a, and *fn.*, 21. Respondent's name was inaccurately inscribed *only* on the Stay of proceedings about which he openly complains, at *id.*, 97a.

affirmations submitted in support of their motion to dismiss and for sanctions. Pet. App. 41a. The analysis demonstrated that Justice Cahn's sanction order was actually copied, in many instances *literally* word-for-word, from allegations contained in Riverside's moving papers. The fact that the sanctions order—§7804(e) was essentially *Xeroxed* from Riverside's affidavits was never refuted by either Respondent and ignored by the courts.

The sanctions in this case are inexplicable without reference to New York's recusation régime of "*systemic intimidation.*" (*People v. T & C Design, Inc.*, [*supra*]). In addition to the injustice created by Petitioners' not receiving a day in court on their counterclaim, the sanctions impose another injustice, and are "manifestly unconscionable" under 28 U.S.C. §2106. [28] The baseless dismissal of the mandamus proceeding provide another sad example of the New York courts' continued "systemic intimidation" of the

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[28] Petitioners refused "to suffer a wrong silently than to redress it by legal action." *Bates v. State Bar of Arizona*, 433 U.S. at 433 U. S. 376 (1976). That choice is costing Petitioners' counsel sanctions of $1,000.00 and the humiliating publication of his name in official State reports as "knowing[ly] engaging in frivolous conduct," by his "disrespect directed at two judges. (Pet. App. 59a).

The sanctions were twice featured on the front page of the *New York Law Journal*, (". . . the highest circulation legal daily in the United States." [law.com/jps/ny]): Beth Bar, "Attempt to Disqualify Judge Brings Sanction" N.Y.L.J. Wed. Oct. 31, 2007. Vol. 238—No. 85; and, "Attorney's Attempt to Disqualify Judge Found Frivolous, Brings Sanctions" N.Y.L.J. Mon. Nov. 5, 2007; Vol. 238—No. 88.

bar in the context of recusal. Judge Thomas F. Liotti, (*People v. T & C* [*supra*]).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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No.:

IN THE
Supreme Court of the United States

WILLIAM KYLE, KATHRYN GILBERT,
AND MARY KYLE,

Petitioners,

v.

HON. GERALD LEBOVITS, (JHC), AND
736 RIVERSIDE DR., LLC.,

Respondents.

On Petition for a Writ of Certiorari
To the State of New York Court of Appeals

APPENDIX

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APPENDIX A:

State of New York Court of Appeals
Slip Copy, 2009 WL 2871192 (Table) (N.Y.), 2009 N.Y. Slip Op. 82571

September 8, 2009.

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighth day of September, 2009

PRESENT, HON. JONATHAN LIPPMANN,
*Chief Judge, **presiding.***

In the Matter of William KYLE, et al., Appellants,
v.
Hon. Gerald LEBOVITS, et al., Respondents

A MOTION for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein, papers having been submitted thereon and due deliberation having been thereon had, it is

ORDERED, that the said motion, insofar as it seeks leave to appeal from that portion of the Appellate Division order that dismissed the appeal from that portion of Supreme Court's order that imposed sanctions upon Appellants' counsel, be and

the same hereby is dismissed upon the ground that as to said part of the order appellants are not parties aggrieved within the meaning of CPLR §5511; and it is,

ORDERED, that the said motion for leave to appeal otherwise be and the same hereby is denied insofar as it seeks leave to appeal from that portion of the Appellate Division order that dismissed the appeal from that portion of Supreme Court's order that imposed sanctions upon appellants' counsel, dismissed upon the ground that as to said part of the order appellants are not parties aggrieved within the meaning of CPLR §5511; motion for leave to appeal otherwise denied.

Stuart M. Cohen
Clerk of the Court

APPENDIX B:

Housing Part: Civil Court of the City of New York

736 Riverside Drive LLC., v. Kyle, et al.,
L&T 77281/06

DECISION ON MOTION FOR RPL §234
ATTORNEYS FEES AND EXPENSES

January 26, 2007

Gerald Lebovits, J.

On April 15, 2003, Hudson Overlook, LLC, commenced a nonpayment proceeding (Index No. 68658/03) against respondents. On December 23, 2004, the Honorable Ulysses B. Leverett granted respondents a judgment of $21,373.40 after trial. Hudson Overlook filed a notice of appeal on January 17, 2005. The Appellate Term dismissed the appeal on August 15, 2005, because Hudson Overlook failed to perfect it. On July 28, 2005, Hudson Overlook transferred its interest in the subject building to 736 Riverside Drive, LLC. On December 1, 2005, respondents moved (Motion Sequence No. 15) to amend the caption to add 736 Riverside Drive and for attorney fees. Because of scheduling conflicts between the attorneys for both sides, the court never decided the motion. The motion to amend the caption and for attorney fees was adjourned three times: December 9, 2005, January 6, 2006, and February 10, 2006. On March 16, 2006, the parties agreed to

mark the motion off the calendar with an understanding that it would be restored later.

On June 16, 2006, 736 Riverside Drive filed a new nonpayment proceeding (Index No. 77281/06) against respondents. Respondents answered on July 21, 2006. Contained in respondents' answer was a reservation of their right to move for an "accelerated/summary judgment" for attorney fees for their successful defense in Index No. 68658/03, the Hudson Overlook proceeding. Respondents asserted three counterclaims in their answer to 736 Riverside Drive's petition. None of their counterclaims sought to hold 736 Riverside Drive liable for attorney fees as Hudson Overlook's *successor-in-interest*. On July 24, 2006, respondents moved for summary judgment against 736 Riverside Drive for attorney fees (Motion Sequence No. 2). On October 20, 2006, 736 Riverside Drive filed its affirmation in opposition to respondents' motion for summary judgment for attorney fees (Motion Sequence No. 2). On November 20, 2006, respondents filed their reply to 736 Riverside Drive's affirmation in opposition to respondents' motion for summary judgment for attorney fees (Motion Sequence No. 2).

On July 24, 2006, in Index No. 68658/03, respondent moved (Motion Sequence No. 16) for an "inquest/hearing" on attorney fees; to consolidate the proceeding with Index No. 77281/06; and to restore Index No. 68658/03 to the calendar. On

October, 20, 2006, Hudson Overlook filed its affirmation in opposition to respondents' motion (Motion Sequence No. 16).

On August 18, 2006, in Index No. 77281/06, respondents filed an order to show cause (Motion Sequence No. 3) seeking a stay of the proceedings until the court decides respondents' motion. In the alternative, respondents moved (Motion Sequence No. 2) to strike 736 Riverside Drive's petition for its alleged failure to comply with a stipulation dated July 24, 2006, in which the parties agreed to adjourn the motion for summary judgment until August 23, 2006, and in which 736 Riverside Drive agreed to serve opposition papers to respondents' motion for summary judgment by August 15, 2006. 736 Riverside Drive's opposition papers to respondents' motion for summary judgment (Motion Sequence No. 2) were filed on October 20, 2006.

On November 30, 2006, in Index No. 68658/03, respondents filed an order to show cause (Motion Sequence No. 19) to substitute or join 736 Riverside Drive, LLC, as a petitioner. Respondents also sought to amend the caption to include 736 Riverside Drive as Hudson Overlook's *successor-in-interest*.

Before this court are the following five above-mentioned motions: (1) in Index No. 68658/03, res-

pondents' motion (Motion Sequence No. 15) to amend the caption to add 736 Riverside Drive and for attorney fees; (2) in Index No. 77281/06, respondents' motion (Motion Sequence No. 2) for summary judgment against 736 Riverside Drive for attorney fees; (3) in Index No. 68658/03, respondents' motion (Motion Sequence No. 16) for an "inquest/hearing" on attorney fees, to consolidate the proceeding with Index No. 77281/06, and to restore Index No. 68658/03 to the calendar; (4) in Index No. 77281/06, Respondents' order to show cause (Motion Sequence No. 3) seeking a stay of Index No. 77281/06 until respondents' motion to consolidate in Index No. 68658/03 is decided; (5) in Index No. 68658/03, respondents' order to show cause (Motion Sequence No. 19) seeking to substitute or join 736 Riverside Drive as a petitioner or amend the caption to include 736 Riverside Drive. In each motion, respondents seek to recover from 736 Riverside Drive attorney fees for their successful defense during the first nonpayment proceeding, in Index No. 68658/03, with Hudson Overlook.

If a residential lease provides that a landlord may recover attorney fees for prevailing in an action or proceeding brought against a tenant, an implied reciprocal agreement arises that the tenant may recover attorney fees from the landlord for successfully defending that action or proceeding. (RPL § 234.) Attorney fees may be sought as either a counterclaim or a summary proceeding. (Id.) A successor-in-interest to a leased property is liable for

its *predecessor-in-interest's* obligations. (E.g. *Stasyszyn v Sutton E. Assocs.*, 213 AD2d 337, 338 [1st Dept 1995, mem].) Successors are thus responsible for their predecessors' obligations under RPL § 223, which provides that a "lessee of real property ... has the same remedy against the lessor, his grantee or Assignee . . . for the breach of an agreement in the lease, that the lessee might have had against his immediate lessor."

Respondents' lease provided that if petitioner prevailed in a proceeding against respondents, respondents would be liable for attorney fees. If respondents were successful *in* defending a proceeding brought by Hudson Overlook, the prior landlord, respondents had a reciprocal right to recover attorney fees. All parties agree that respondents prevailed in the Hudson Overlook nonpayment proceeding. Accordingly, under RPL § 234, respondents have a statutory, reciprocal right to reasonable attorney fees that Hudson Overlook is obligated to pay.

736 Riverside Drive is Hudson Overlook's *successor-in-interest* because Hudson Overlook transferred its ownership of the subject building to 736 Riverside Drive on July 28, 2006. 736 Riverside Drive is liable for Hudson Overlook's obligations. Under respondents' lease and RPL § 234, Hudson Overlook is obligated to pay respondents' attorney

fees for respondents' successful defense in Index No. 68658/03. Accordingly, under RPL § 223 and § 234, respondents may counterclaim for attorney fees from 736 Riverside Drive. Whether the counterclaim is meritorious cannot be decided at this time.

This court is precluded from ruling on respondents' potential counterclaim for attorney fees to 736 Riverside's petition, in Index No. 77281/06, because respondents have not asserted a counterclaim. RPL §234 requires that any action to recover attorney fees must be a counterclaim or a summary proceeding. A counterclaim must be denominated as such. (CPLR §3011.) Respondents' answer to 736 Riverside Drive's petition did not assert a counterclaim for attorney fees against 736 Riverside Drive. Respondents' answer to 736 Riverside Drive's petition merely reserved their right to move for "accelerated/summary judgment" for attorney fees. Respondents' reservation of their right to move for "accelerated/summary" judgment for attorney fees is insufficient to meet the statutory requirement to denominate a counterclaim.

Under CPLR §3025 (b), parties that fail to denominate a counterclaim must move for leave to amend their answer to include that counterclaim. Respondents may move for leave to amend their answer to include a counterclaim for attorney fees under RPL § 234, if they deem it advisable. 736 Riverside Drive may oppose that motion if it deems it advisable.

If respondents had filed a counterclaim for attorney fees in response to 736 Riverside Drive's petition, all five of respondents' motions would have been academic or non-meritorious, or both. A counterclaim for attorney fees in Index No. 77281/06 would obviate the court's need whether to consider, among other things, to restore Index No. 68658/03 and then to consolidate Index No. 77281/06 with Index No. 686858/03; to rule on successor liability; to entertain 736 Riverside Drive's argument in opposition that the laches doctrine affects any award; and to decide whether to add or join a prior party.

For judicial economy and to allow both sides to prosecute the issue of attorney fees efficiently, this court must deny all of respondents' motions—all five of which repetitively seek but one thing: attorney fees from 736 Riverside Drive, the current petitioner, for prevailing against Hudson Overlook, the prior petitioner.

Index No. 68658/03 is marked off the court's calendar. Index No. 77281/06 is adjourned to February 20, 2007, in Part G at 9:30 a.m. Between now and February 20, Respondents may move for leaver to amend their answer to add a counterclaim seeking attorney fees for work don in Index No. 68658/03. This opinion is the court's decision and order.

Dated: January 26, 2007.
J.H.C.
Hon. Gerald Lebovits

APPENDIX C:

Housing Part: Civil Court of the City of New York
736 Riverside Drive LLC., v. Kyle, et al.,
L&T 77281/06

DECISION DENYING MOTION FOR RE-HEARING

FEBRUARY 22, 2007

Declined: [Petitioners] submitted five motions when all they should have done is ***counterclaim clearly*** *for legal fees in the current non-payment proceeding. Despite the arguments in the affirmation, [Petitioners] never counter claimed; the five motions are duplicative and issue never joined. So summary judgment was never an option.*

Gerald Lebovits, J.H.C

NEW YORK HOUSING COURT

736 RIVERSIDE DRIVE LLC., *Petitioner,*	Part O Room 127-A
-against-	Index No.: 77281/06
WILLIAM KYLE, KATHRYN GILBERT, and **MARY KYLE** *Respondents.*	**ORDER TO SHOW CAUSE: TO RE-ARGUE PRIORORDER**

UPON the reading of the annexed Supporting Affirmation/Memorandum of Ronald

APPENDIX D:

Housing Part: Civil Court of the City of New York
736 Riverside Drive LLC., v. Kyle, et al.,
L&T 77281/06

DECISION ON MOTION TO AMEND ANSWER
March 30, 2007
Peter M. Wendt, J

The original answer herein was served in July 2006, far more than 20 days ago. This motion which now seeks t amend that July 06 answer to include a legal claim has no copy of any lease annexed entitled either side to legal fees. Additionally, the petition herein contains no claim for legal fees whatever. Respondent in this motion seeks to obtain legal fees incurred in an earlier action, Index No. 68658/03. In that proceeding named Hudson Overlook LLC against Kyle et al. Petitioner herein was not even a party.

For these reasons, this motion is denied without prejudice to a motion by Respondent in Index No.: 68658/03Hudson Overlook LLC for the legal incurred therein or to a plenary action for same. This matter is referred back to Part "O" for a trial

Dated: March 30, 2007

J.H.C.
Hon. Peter M. Wendt

APPENDIX E:

Housing Part: Civil Court of the City of New York
736 Riverside Drive LLC., v. Kyle, et al.,
L&T 77281/06
DENIAL OF DISQUALIFICATION

July 9, 2007

Denied—This document is the most outrageous document the Court has seen in its 5½ years of service on the bench.

Gerald Lebovits, J

736 RIVERSIDE DRIVE LLC., *Petitioner,* —against— WILLIAM KYLE, KATHRYN GILBERT, and MARY KYLE, *Respondents.*	Part O Room 1127-A Index No.: 77281/06 **OSC FOR DISQUALIFICATION**

UPON the reading of the annexed Supporting Affidavits of the Respondents, sworn to on July 9th, 2007, the exhibits annexed thereto and all proceedings had heretofore in the cause:

LET, the Petitioner, 736 Riverside Drive LLC., or its attorneys of record, show cause before me at

why an order should not be entered:

DISQUALIFYING the Honorable Judge Gerald Lebovits pursuant Judiciary Law §14 as of May 24th, 2007, and;

GRANTING such other and further relief as this Court deems just and proper;

◆

SUPPORTING AFFIDAVIT

KATHRYN GILBERT, Respondent pro se in the above-captioned matter, after first being duly sworn, states the following to be true under the penalty of perjury:

1. I am Respondent pro se in the above-captioned matter and I reside at 726 Riverside Drive 6C, New York, NY 10031.

2. On or about June 20th, 2007, Judge Lebovits "so-ordered" a partial settlement of the above-captioned matter on the "*issue* of attorneys fees" an issue which was also the subject matter in the Article 78 proceeding against Judge Lebovits, pending at the time.

3. Once it became apparent that that the June 21st, 2007 Stipulation and Settlement (**Exhibit "A"**) was *conditioned* on the discontinuance Article 78 proceeding in which Judge Lebovits was both a

party and had an interest, Judge Lebovits became statutorily disqualified pursuant to §14 of the Judiciary Law.

4. Judiciary Law §14 provides as follows:

A judge ***shall not*** sit as such in, or ***take any part*** in the decision of, an action, claim, matter, motion or proceeding to ***which he is a party***, or in which he has been attorney or counsel, or in which ***he is interested***, . . .

5. That the Stipulation of Discontinuance entered in the pending Article 78 proceeding in the Supreme Court matter (Index No. 105603/07—**Exhibit "B"**) was conditioned upon the Respondents' signing and consenting to the entry of the June 21st, 2007 settlement herein. And once this inextricable relationship (between the Civil Court Stipulation and the Supreme court Discontinuance) became obvious, Judge Lebovits was statutorily disqualified pursuant to §14 of the Judiciary Law, as having an interest in and being a party to the 105603/07 case the discontinuance of which was condition upon so-ordering the June 21st, 2007 settlement herein.

6. Due to Judge Lebovits' efforts, the 105603/07 matter and the instant matter became inextricably intertwined.

7. The entry, execution, and drafting both agreements were facilitated by Judge Lebovits who—commencing on or about Monday June 3rd, 2007, (and in violation of the CPLR §7805 *stay of proceedings*)—began scheduling appearances at which Respondents' former counsel, Ronald P. Hart, was mandated/summoned and/or requested to appear.

8. That in these adjournment dates of appearance (which occurred four times in June 2007), Judge Lebovits actively sought to have the 105603/07 matter, in which he was a party and had an interest, resolved through settlement in the above-captioned matter.

9. Both cases involved the same *res*: namely, the issue of RPL §234 liability in favor of the Respondents and against the Petitioner, 736 Riverside Drive LLC.

10. Therefore, when, on or about Monday June 3rd, 2007, Judge Lebovits became statutorily disqualified in the instant proceeding once he began lobbying over s four-week period, with all parties, to have the 105603/07 discontinued, a matter to which he was a party and had an interest.

11. That the entry, execution, and drafting both agreements were facilitated by Judge Lebovits who, in violation of the CPLR §7805 stay of proceed-

ings lending the prestige of his office for negotiations of the Article 78 proceeding against him.

12. Again, the Stipulation of Discontinuance and Settlement was *conditioned* on the discontinuance of the proceeding against Judge Lebovits, who although he did not "so order" ¶9 still had an interest in the case notwithstanding his having (technically) not "so-ordered" the language contained in ¶9.

WHEREFORE, I request this Honorable Court enter an order granting the within relief pursuant to §14 of the Judiciary Law.

Dated: New York, New York
July 9, 2007

Kathryn Gilbert

APPENDIX F:

Housing Part: Civil Court of the City of New York
736 Riverside Drive LLC,. v. Kyle, et al.,
L&T 77281/06

August 13, 2007

ORDER ON MOTION TO VACATE STIPULATION

Gerald Lebovits, J

Respondents' motion to vacate the two-attorney stipulation of June 20, 2007, is denied as s frivolous and possibly sanctionable.

A. The Facts and Procedural History

When the parties appeared before this court for trial in two nonpayment proceedings, Index Numbers 68658/03 and 77281/06, the court noticed five undecided motions in the court file. All five, from Respondents, sought attorneys fees for work their attorney did in Index Number 69658/03. Because a trial could not take place until the motions were resolved, the parties argued their positions on January 17, 2007. On January 26, 2007, the court denied all five motions but wrote that respondents could "move for leave to amend their answer to add a counterclaim seeking attorney fees for work done in Index Number 68658/03." Respondents moved for

leave before the Honorable Peter M. Wendt, who denied their motion without prejudice on March 30,2007, because, in part, "[t]he motion . . . ha[d] no copy of any lease annexed entitled either side to legal fees." Judge Wendt referred the matter to this court for trial.

In the interim, and instead of appealing or moving to renew or reargue, Respondent, by counsel, brought an Article 78 proceeding against Judge Wendt and this court to compel us to rule in their favor and award them hundreds and thousands of dollars in attorneys fees. The Article 78, returnable on June 22, 2007, stayed the proceedings under Index Number 77281/06

Having received the case from Judge Wendt, this court held a conference on June 15, 2007. Respondents' counsel appeared by telephone; petitioner's counsel was in court. During that conference, the court told the parties that it made no sense to ask the court to "assist perhaps in settling this case or, if not, in trying this case" (page 47, lines 19-21) while being sued in an Article 78 (page 47, lines 21-22; page 48, lines 3-5). The court expressed the view, therefore, that it should recuse itself (pages 48-50) on the basis of the conflict and because of the strong feelings that the Article 78 engendered — for example, that the Article 78 was "so frivolous and so sanctionable that it shocks the conscience" (page 48, lines 15-16); that respondents brought it as a "way to gain leverage in your case [by] sue[ing] me and Judge Wendt" (page 48, lines 2223); and that "I am

thinking about filing a disciplinary charge" (page 49, lines 9-10). Respondents' counsel countered over the span of many pages in the transcript beginning at page 50 that the court should await a settlement before recusing itself, and the matter was adjourned to June 20, 2007.

On June 20, the court made it clear it was already clear, but just in case — to respondents' counsel that "I have no intention of filing disciplinary charges against you" (page 4, lines 12-13) and that it had brought the matter up because the court wanted to explain the depths of its feelings in favor of recusal. (Pages 3-4.) The court, seeing that the parties had signed a stipulation resolving the attorney-fee issue in Index Number 68658/03, stated that it would not so-order a stipulation covering the Article 78. (Page 4, bottom, and page 5, top.) The court explained that doing so would mean ruling on a case in which it was a litigant. The court also asked whether the parties wanted the court to so-order a stipulation without so-ordering paragraph 9, which concerned discontinuing the Article 78, and parties agreed: Petitioner's counsel and respondents' counsel both said "fine." (Page 6, lines 7-24.) The matter was then adjourned briefly for the parties' stipulation of discontinuance to be signed and filed and for the court to sign the stipulation. (Page 8-10.)

The parties returned that day with a signed stipulation discontinuing the Article 78 and a second stipulation settling the attorney-fee issue in Index Number 68658/03. (Page 57, lines 211.) Before it

signed the stipulation settling Index Number 68658/03, the court asked William Kyle, an unadmitted law-school graduate, whether he wanted to settle. "[I]s this what you want to do?" the court asked. Kyle said "Yes. This, this is what we're going to do. I want to do it." (Page 57, lines 2-5.) After a few minutes the court asked Kyle the question again: "Tell me what you want to do," and Kyle said, "Don't start tearing up everything. This is fine." (Page 60, lines 5 & 10-11.) The court recused itself on Index Number 77281/06, referred that case to Part X, the expediter, for trial, and signed the stipulation in Index Number 68658/03, except for paragraph 9. The stipulation gave respondents $190,000 in attorney fees.

Barely had the ink dried on the stipulation than Kyle, on July 9, 2007, submitted a pro se order to show cause to disqualify this court retroactively "as of May 24th, 2007" on the ground that this court took part in an action in which it was a party, in violation of Judiciary Law § 14. According to Kyle, this court was disqualified from presiding over his nonpayment case because he had sued the court in an Article 78 proceeding. The court declined to sign Kyle's order to show cause, writing, "This is the most outrageous document the court has seen in its 5½ years of service on the bench."

Undeterred by the court's order-to-show-cause declension, respondents, represented by new counsel — Robin Kyle, Kyle's brother — now move to vacate the June 20 stipulation. They claim (1) that this court had no authority to so-order a stipulation

while a stay was in effect; (2) that this court had a conflict of interest because it was sued in the article 78; (3) that this court coerced their prior counsel into signing the stipulation by threatening him with disciplinary action; and (4) that Kathryn Gilbert, William Kyle's roommate, and Mary Kyle, William Kyle's wife, did not know about the stipulation and never received part of the $190,000.

Undeterred by their discontinuing their Article 78 with prejudice, respondents, through their new counsel, also filed a new Article 78 to compel this court to vacate the June 20 stipulation. Respondents served their Article 78 after they moved in this court to vacate the stipulation — prematurely before knowing whether this court would grant or deny their relief and, again to influence the proceeding and to intimidate this court into ruling in their favor, without waiting to appeal.

By this motion respondents hope to get more money. Petitioner's counsel has represented that petitioner already paid the $190,000 in a check to prior counsel.

B. Conclusions of Law

I. Respondents' motion is denied as Frivolous and Possibly Sanctionable.

a. Respondents' argument that the court could not so-order the stipulation because it was stayed as

to Index Number 68658/03 is frivolous and possibly sanctionable:

• No Supreme Court stay was in effect in Index Number 68658/03, the case as to which the court signed the June 20 stipulation. The stay applied to Index Number 77281/06.

• This court did not sign the stipulation until it saw respondents' signed discontinuance with prejudice of the Article 78. If there had been a stay on Index Number 68658/03, and there was none, the stay had ended by the time the court signed the stipulation.

• The court recused itself in Index Number 77281/06 and sent the court file to Part X for trial before another judge. If there had been a stay on Index Number 68658/03, and there was none, the court honored the stay.

• Respondents repeatedly asked this court to settle or try handle both index numbers. They cannot in retrospect withdraw their requests — requests about which this court, and not respondents, raised question.

• Whether this court should have honored the stay is irrelevant to whether the stipulation should be vacated. Respondents are free to move to hold this court in contempt if they believe that it violated the Supreme Court stay. Given that respondents themselves participated in the proceedings before this court, they, too, must also have violated the

Supreme Court stay and deserve to be held in contempt.

b. Respondents' argument that the court had a conflict of interest because respondents sued it in the Article 78 is frivolous and possibly sanctionable:

- No conflict existed when the time the court signed the stipulation. This court did not sign the stipulation until respondents discontinued the Article 78 with prejudice.

- To eliminate the possibility of a conflict, the court recused itself as to Index Number 77281/06 and sent the case to Part X for trial before another judge.

- Respondents never sought to recuse this court based on any conflict. They did the opposite: They wanted this court to handle their cases.

- The law would be perverted if a party succeeded in retroactively obtaining recusal, in this case to May 24, 2007, because it did not like a decision, and instead of appealing it filed an Article 78. That would prevent a judge from ruling against a litigant twice. Yet this is exactly what respondents are trying to do.

c. Respondents' argument that it coerced prior counsel to sign the stipulation is frivolous and possibly sanctionable:

- It would have been unreasonable in context

for respondents' prior counsel to have believed that the court's June 15 statement "I am thinking about filing a disciplinary charge" was meant to convey that this court would do so. The court made the statement to explain why it should recuse itself — a recusal respondents did not want.

• To the extent that doubt existed, the court on June 20, before it signed and even saw any proposed stipulation, told respondents' counsel, "I have no intention of filing disciplinary charges against you" and that it had brought the matter up because I wanted to explain the depths of its feelings favoring recusal. Prior counsel knew before the attorney-fee issue was settled that he was not subject to any possibility of discipline

• Even though the court had no intention to file disciplinary charges against prior counsel, he deserved it for his conduct. It is immoral to coerce a court and influence litigation by suing a judge, and it is Law 101 that a lawyer does not file an Article 78 instead of appealing. Truth is a defense that cannot be turned on the court.

• The evidence that the court's comments caused respondents to settle is speculative to the point of absurdity. Respondents offer no evidence to suggest that the court intimidated prior counsel, that any intimidation caused prior counsel to intimidate respondents to accept the stipulation, or that respondents were intimidated. Respondents accepted

the stipulation to get $190,000, not because prior counsel violated his obligation of undivided loyalty. Moreover, if the court's comments had affected prior counsel to do or not to do something, they would have effected a settlement of the Article 78, not a settlement of the attorney-fee issue.

d. Respondents Kathryn Gilbert and Mary Kyle's argument that the stipulation should be vacated because they did not know about the stipulation and never received part of the $190,000 *is* frivolous and possibly sanctionable:

- If William Kyle did not tell Kathryn Gilbert and Mary Kyle, respectively Kyle's roommate and spouse, they have only him to blame.

- Kathryn Gilbert and Mary Kyle are bound by a stipulation signed by their attorney even if they did not know about it.

- That Kathryn Gilbert, Mary Kyle, and William Kyle do not know what happened to the $190,000, even if true, is not a ground to vacate the stipulation. The court has no doubt that respondents have failed to disclose something on this topic.

II. The Possibility of Sanctions Upon on Kyle and His Current Attorney

Everything respondents argue shocks the conscience. This is not simply a matter of respondents'

seeking to vacate a two-attorney stipulation so-ordered in open court, a vacatur not lightly granted. (*See e.g. Hallockv State,* 64 NY2d 224 [1984]) This is a matter of respondents' moving in bad faith.

Kyle wanted the stipulation, as he told the court twice on June 20. He and new counsel, his brother, changed their mind to get more money now that petitioner has paid Kyle, or him through his lawyer, $190,000. Their motion, designed to threaten the court, cannot succeed. Their made-up arguments include trying to manipulate the system of justice in an egregious, unethical way: They brought an Article 78 instead of appealing. They asked the court to continue presiding over the matter even when the court did not wish to do so. They asked this court to so-order the stipulation discontinuing the Article 78 proceeding; only this court pointed out the impropriety in doing so. And then, after they discontinued the Article 78 and got the benefit of their settlement, they seek retroactively to recuse the court. For all this, respondents accuse this court of the very misconduct of which they are guilty.

Kyle and his current counsel were warned not to submit this motion. The court's July 9 declension could not have been stronger. The court wrote: "This is the most outrageous document the court has seen in its 5½ years of service on the bench." That was true at the time, but this motion surpasses that one. In persisting, Kyle, a law graduate, and his current-counsel brother not only should have known better, it is inconceivable that they did no know better.

This proceeding is adjourned to October 9, 2007, in Part "O" on whether the court should impose sanctions against William or Robin Kyle, or both of them, and , if so in what monetary amount.

Dated: August 13, 2007

J.H.C.
Hon. Gerald Lebovits

APPENDIX G:

Housing Part: Civil Court of the City of New York
736 Riverside Drive LLC., v. Kyle, et al.,
L&T 77281/06

August 24, 2007

AMENDED DECISION ON MOTION TO VACATE

Gerald Lebovits, J

The court's order and opinion of August 13, 2007, is withdrawn. This opinion is submitted in its place. The primary difference between this opinion and the August 13 opinion is that the court now withdraws its August 13 opinion ordering that a sanctions hearing be held on October 9, 2007, and instead directs that the parties appear on October 9, 2007, for trial.

Respondents' motion to vacate the two-attorney stipulation of June 20, 2007, is denied as s frivolous and possibly sanctionable.

A. The Facts and Procedural History

When the parties appeared before this court for trial in two nonpayment proceedings, Index Numbers 68658/03 and 77281/06, the court noticed five undecided motions in the court file. All five, from Respondents, sought attorneys fees for work their

attorney did in Index Number 69658/03. Because a trial could not take place until the motions were resolved, the parties argued their positions on January 17, 2007. On January 26, 2007, the court denied all five motions but wrote that respondents could "move for leave to amend their answer to add a counterclaim seeking attorney fees for work done in Index Number 68658/03." Respondents moved for leave before the Honorable Peter M. Wendt, who denied their motion without prejudice on March 30, 2007, because, in part, "[t]he motion . . . ha[d] no copy of any lease annexed entitled either side to legal fees." Judge Wendt referred the matter to this court for trial.

In the interim, and instead of appealing or moving to renew or reargue, Respondents, by counsel, brought an Article 78 proceeding against Judge Wendt and this court to compel us to rule in their favor and award them hundreds and thousands of dollars in attorneys fees. The Article 78, returnable on June 22, 2007, stayed the proceedings under Index Number 77281/06.

Having received the case from Judge Wendt, this court held a conference on June 15, 2007. Respondents' counsel appeared by telephone; petitioner's counsel was in court. During that conference, the court told the parties that it made no sense to ask the court to "assist perhaps in settling this case or, if not, in trying this case" (page 47, lines 19-21) while being sued in an Article 78 (page 47,

lines 21 - 22; page 48, lines 3 - 5). The court expressed the view, therefore, that it should recuse itself (pages 48-50) on the basis of the conflict and because of the strong feelings that the Article 78 engendered — for example, that the Article 78 was "so frivolous and so sanctionable that it shocks the conscience" (page 48, lines 15-16).; that respondents brought it as a "way to gain leverage in your case [by] su[ing] me and Judge Wendt" (page 48, lines 22-23); and that "I am thinking about filing a disciplinary charge" (page 49, lines 9 - 10). Respondents' counsel countered over the span of many pages in the transcript beginning at page 50 that the court should await a settlement before recusing itself, and the matter was adjourned to June 20, 2007.

On June 20, the court made it clear—it was already clear, but just in case—to respondents' counsel that "I have no intention of filing disciplinary charges against you" (page 4, lines 12 - 13) and that it had brought the matter up because the court wanted to explain the depths of its feelings in favor of recusal. (Pages 3 - 4.) The court, seeing that the parties had signed a stipulation resolving the attorney-fee issue in Index Number 68658/03, stated that it would not so-order a stipulation covering the Article 78. (Page 4, bottom, and page 5, top.) The court explained that doing so would mean ruling on a case in which it was a litigant. The court also asked whether the parties wanted the court to so-order a stipulation without so-ordering paragraph 9, which

concerned discontinuing the Article 78, and the parties agreed: Petitioner's counsel and respondents' counsel both said "fine." (Page 6, lines 7-24.) The matter was then adjourned until later that day for the parties to sign and file their stipulation discontinuing the Article 78 and for the court to so-order the stipulation settling the attorney-fee issue in Index Number 68658/03. (Pages 8-10.)

The parties returned that day with a signed stipulation discontinuing the Article 78 with prejudice and a second stipulation settling the attorney-fee issue in Index Number 68658/03. (Page 57, lines 2 - 11.) The court never so-ordered the stipulation discontinuing the Article 78. Before it so-ordered the stipulation settling Index Number 68658/03, the court asked William Kyle, an unadmitted law-school graduate, whether he wanted to settle. "[I]s this what you want to do?" the court asked. Kyle said "Yes. Uh, this is what we're going to do. I want to do it." (Page 57, lines 2-5.) After a few minutes the court asked Kyle the question again: "Tell me what you want to do," and Kyle said, "Don't start tearing up everything. This is fine." (Page 60, lines 5 & 10-11.) The court recused itself on Index Number 77281/06; referred that case to Part X, the expediter, for trial on July 17, 2007, the date Kyle selected; and so-ordered the stipulation in Index Number 68658/03, except for ¶9. The stipulation gave respondents $190,000 in attorney fees.

Barely had the ink dried on the stipulation than Kyle, on July 9, 2007, submitted a pro se order

to show cause to disqualify this court retroactively "as of May 24th, 2007" on the ground that this courttook part in an action in which it was a party, in violation of Judiciary Law § 14. According to Kyle, this court was disqualified from presiding over his nonpayment case because he had sued the court in an Article 78 proceeding. The court declined to sign Kyle's order to show cause, writing, "This is the most outrageous document the court has seen in its 5 1/2 years of service on the bench." Undeterred by the court's order-to-show-cause declension, respondents, represented by new counsel — Robin Kyle, Kyle's brother — now move to vacate the June 20 stipulation. They claim (1) that this court had no authority to so-order a stipulation while a stay was in effect; (2) that this court had a conflict of interest because it was sued in the article 78; (3) that this court coerced their prior counsel into signing the stipulation by threatening him with disciplinary action; and (4) that Kathryn Gilbert, William Kyle's roommate, and Mary Kyle, William Kyle's wife, did not know about the stipulation and never received part of the $190,000.

Undeterred by their discontinuing their Article 78 with prejudice, respondents, through their new counsel, also filed a new Article 78 to compel this court to vacate the June 20 stipulation. Respondents served their Article 78 after they moved in this court to vacate the stipulation—prematurely before knowing whether this court would grant or deny their relief and, again to influence the proceeding and to intimidate this court into ruling in their favor,

without waiting to appeal. Despite their Article 78 seeking to compel this court to render a ruling, respondents sought to stay this court from rendering a ruling. Supreme Court declined to grant a stay.

This court therefore heard argument on respondents' motion.

Petitioner's counsel has represented that petitioner has already complied with the June 20 stipulation by paying the $190,000 in a check to prior counsel. By this motion, respondents hope to get more money.

B. Conclusions of Law

I. Respondents' motion is denied as frivolous and possibly sanctionable.

a. Respondents' argument that the court could not so-order the stipulation because it was stayed as to Index Number 68658/03 is frivolous and possibly sanctionable:

- No Supreme Court stay was in effect in Index Number 68658/03, the case as to which the court so-ordered the June 20 stipulation. The stay applied to Index Number 77281/06.

- This court did not so-order the stipulation in Index Number 65658/03 until it saw that respondents signed a stipulation discontinuing their

Article 78 with prejudice. If there had been a stay on Index Number 68658/03, and there was none, the stay had ended by the time the court so-ordered the stipulation settling Index Number 68658/03.

• The court recused itself in Index Number 77281/06 and sent the court file to Part X for trial on July 17, 2007, before another judge. If there had been a stay on Index Number 68658/03, and there was none, the court honored the stay.

• Respondents repeatedly asked this court to settle or try both index numbers. They cannot in retrospect withdraw their requests — requests about which this court, and not respondents, raised questions.

• Whether this court should have honored the stay is irrelevant to whether the stipulation should be vacated. Respondents are free to move to hold this court in contempt if they believe that it violated the Supreme Court stay. Given that respondents themselves participated in the proceedings before this court, they, too, must also have violated the Supreme Court stay and deserve to be held in contempt.

b. Respondents' argument that the court had a conflict of interest because respondents sued it in the Article 78 is frivolous and possibly sanctionable:

- No conflict existed when the court so-ordered the stipulation in Index Number 68658/03. This court did not so-order that stipulation until respondents discontinued the Article 78 with prejudice.

- To eliminate the possibility of a conflict, the court recused itself as to Index Number 77281/06 and sent the case to Part X for trial before another judge.

- Respondents never sought to recuse this court based on any conflict. They did the opposite; They wanted this court to handle their cases.

- This court did not rule in a matter in which it *was* a party. It did not preside over the Article 78 proceeding, it did not so-order the stipulation settling the Article 78 proceeding, and it did not so-order the one paragraph (¶ 9) in the stipulation settling Index Number 68658/03 that referred to the Article 78 proceeding.

- The law would be perverted if a party succeeded in retroactively obtaining recusal, in this case to May 24, 2007, because it did not like a decision, and instead of appealing it filed an Article 78. That would prevent a judge from ruling against a litigant twice. Yet this is exactly what respondents are trying to do. Respondents sued this court and now argues that it has a conflict because of the suit.

c. Respondents' argument that it coerced prior counsel to sign the stipulation is frivolous and possibly sanctionable:

• It would have been unreasonable in context for respondents' prior counsel to have believed that the court's June 15 statement "I am thinking about filing a disciplinary charge" was not meant to convey that this court would do so. The court made the statement to explain why it should recuse itself — a recusal respondents did not want — and why it did recuse itself in Index Number 77281/06.

• To the extent that doubt existed, the court on June 20, before it so-ordered any proposed stipulation, told respondents' counsel, "I have no intention of filing disciplinary charges against you" and that it had brought the matter up because I wanted to explain the depths of its feelings favoring recusal. Prior counsel knew before the attorney-fee issue was settled that he was not subject to any possibility of discipline.

• Even though the court had no intention to file disciplinary charges against prior counsel, he deserved it for his conduct. It is immoral to coerce a court and influence litigation by suing a judge, and it is Law 101 that a lawyer does not file an Article 78 instead of appealing. Truth is a defense that cannot be turned on the court

• The evidence that the court's comments caused respondents to settle is speculative to the

point of absurdity. Respondents offer no evidence to suggest that the court intimidated prior counsel, that any intimidation caused prior counsel to intimidate respondents to accept the stipulation, or that respondents were intimidated. Respondents accepted the stipulation to get $190,000, not because prior counsel violated his obligation of undivided loyalty. Moreover, if the court's comments had affected prior counsel to do or not to do something, they would have effected a settlement of the Article 78, not a settlement of the attorney-fee issue.

d. Respondents Kathryn Gilbert and Mary Kyle's argument that the stipulation should be vacated because they did not know about the stipulation and never received part of the $190,000 is frivolous and possibly sanctionable:

- If William Kyle did not tell Kathryn Gilbert and Mary Kyle, respectively Kyle's roommate and spouse, they have only him to blame.

- Kathryn Gilbert and Mary Kyle are bound by a stipulation signed by their attorney even if they did not know about it.

- That Kathryn Gilbert, Mary Kyle, and William Kyle do not know what happened to the $190,000, even if true, is not a ground to vacate the stipulation. The court has no doubt that respondents have failed to disclose something on this topic.

II. The Possibility of Sanctions on Kyle and His Current Attorney

• Everything Respondents argue shocks the conscience. This is not simply a matter of respondents' seeking to vacate a two-attorney stipulation so-ordered in open court, a vacatur not lightly granted. *(See e.g. Hallock v. State,* 64 NY2d 224 [1984].) This is a matter of respondents' moving in bad faith.

Kyle wanted the stipulation, as he told the court twice on June 20. He and new counsel, his brother, changed their mind to get more money now that Petitioner has paid Kyle, or him through his lawyer, $190,000. Their motion, designed to threaten the court, cannot succeed. Their made-up arguments include trying to manipulate the system of justice in an egregious, unethical way: They brought an Article 78 instead of appealing. They asked the court to continue presiding over the matter when the court stated that it did not wish to do so. This court refused to so-order either the paragraph in the stipulation covering Index Number 68658/03 or the stipulation discontinuing the Article 78 proceeding, but respondents argue that it presided over a case in which it was a litigant. And then, after they discontinued the Article 78 and got the benefit of their settlement, they seek retroactively to recuse the court. For all this, Respondents accuse this court of the very misconduct of which they are guilty.

Kyle and his current counsel were warned not to submit this motion. The court's July 9, declension could not have been stronger. The court wrote: "This is the most outrageous document the court has seen in its 5-1/2 years of service on the bench." That was true at the time, but this motion surpasses that one. In persisting, Kyle a law graduate, and his current-counsel brother not only should have known better, it is inconceivable that they did not know better.

Even though William or Robin, or both of them, engaged in frivolous litigation, and even though the court could and perhaps should schedule a sanctions hearing under 22 NYCRR 130-1.1[d]), the court, in it discretion, and on reflection, declines to do so. The court will have no choice to consider sanctions if, however, either William or Robin Kyle, or both, engage in any further frivolous litigation.

This proceeding is adjourned, at both sides' request, to October 9, 2007, in Part X for trial certain.

Dated: August 24, 2007

J.H.C.
Hon. Gerald Lebovits

APPENDIX H:

Supreme Court of the State of New York

In the Matter of William KYLE, et al., Petitioners,
v.
Hon. Gerald LEBOVITS, et al., Respondents

October 26, 2007

17 Misc.3d 1124(A), 851 N.Y.S.2d 70 (Sup. Ct., 2007)

HERMAN CAHN, J.

Petitioners move for a writ of mandamus, pursuant to CPLR Article 78 and Judiciary Law §14, directing Respondent, the Hon. Gerald A. Lebovits to disqualify himself *nunc pro tunc* to June 4, 2007 with regard to all matters relative to two non-payment proceedings pending in the Housing Part of the Civil Court of the City of New York, County of New York, entitled *Hudson Overlook LLC v. William Kyle, Kathryn Gilbert, and Mary Kyle,* L & T Index No. 68658/03 (the "2003 non-payment case") and *736 Riverside Dr., LLC v. William Kyle, Mary Kyle and Kathryn Gilbert,* L & T Index No. 77281/06 (the "2006 non-payment case"). Petitioners also seek a stay of the 2006 non-payment case allegedly pending before Judge Lebovits in Part O.

Respondent 736 Riverside Dr., LLC (736 Riverside Drive) cross-moves for sanctions against the petitioners and their attorney, pursuant to 22 NYCRR 130-1.1, for knowingly engaging in frivolous conduct.

By notice, pursuant to CPLR §7804(I), respondent Lebovits elected not to appear in this proceeding and referred the court to a decision and order he rendered on August 24, 2007 in the 2006 non-payment case.

Since the filing of the instant order to show cause, several developments have partially rendered the relief sought herein moot. First, in his August 24th order, Judge Lebovits made clear that he had recused himself as to the 2006 non-payment case and, again, sent it to Part X for trial before another judge on October 9, 2007.[1] In addition, Judge Lebovits refused to vacate the stipulation of settlement he "so ordered" on June 20, 2007 in the non-payment cases. Said stipulation settled an out-

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[1] Judge Lebovits initially recused himself from the 2006 non-payment case on June 20, 2007. At oral argument on petitioners' motion, made to Judge Lebovits in the Housing Court, to vacate the Stipulation held on August 13, 2007, he again made it clear that he had recused himself from hearing that case.

standing attorney fee issue and, pursuant to which, petitioners were awarded $190,000 in attorney fees (the "Stipulation"). Finally, at argument of this application on September 10, 2007, this court declined to issue any stay the 2006 non-payment case.

Basically, petitioners seek to vacate the Stipulation on three grounds. First, petitioners argue that the stipulation was entered into in violation of a stay issued by this court on May 31, 2007. Second, petitioners contend that Judge Lebovits was statutorily disqualified under Judiciary Law § 14 from presiding over the Civil Court non-payment cases by virtue of his being named a respondent in an Article 78 mandamus proceeding, and that this court should order that Judge Lebovits be retroactively disqualified from the Housing Court proceedings, thus vitiating the Stipulation. It should be noted that the Stipulation called for payment of attorneys fees to Petitioners' then attorney (in the non-payment cases), and that the sum it called for has been paid, i.e. petitioners have already received the benefit of their bargain. Third, petitioners make very serious and, as further discussed below, baseless accusations against Judge Lebovits, who is alleged to have "intimidated and harangued" petitioners' former counsel, Ronald Hart, Esq., into entering into the Stipulation.

A brief history of this landlord-tenant dispute and the prior Article 78 proceeding is necessary to resolve the remaining two issues in this proceeding,

which are whether there is any basis for this court to vacate the Stipulation, and whether petitioners and/or their new counsel should be sanctioned for engaging in frivolous conduct.

On April 15, 2003, Hudson Overlook, LLC, the then owners of 736 Riverside Drive, commenced the 2003 non-payment case against the petitioners. On December 23, 2004, petitioners were awarded a judgment of $31,373.40 after trial. An appeal to the

Appellate Term was dismissed on August 15, 2005 for failure to perfect.

On July 28, 2005, Hudson Overlook, LLC transferred its interest in the subject building to 736 Riverside Dr., LLC. In December of 2005, petitioners moved to amend the caption to add 736 Riverside Dr., LLC, as a party and also moved for attorney fees. Due to scheduling conflicts and numerous adjournments, the motion was never heard and marked off the calendar with the understanding that it would be later restored.

On June 16, 2006, 736 Riverside Dr., LLC commenced the 2006 non-payment case. Petitioners answered on July 21, 2006, and asserted three counterclaims. None of the counterclaims sought to hold 736 Riverside Dr., LLC liable for attorney fees as Hudson Overlook, LLC's successor-in-interest. Rather, the answer contained a reservation of petitioners' claimed right to move for an "accelerated/summary judgment" for attorney fees for

their successful defense of the 2003 non-payment case.

After a plethora of motions in both non-payment cases, Judge Lebovits issued a decision and order dated January 26, 2007 in which he ruled that petitioners should seek leave to amend their answer in the 2006 non-payment case to add a counterclaim seeking attorneys fees for work done in the 2003 non-payment case. Petitioners thereupon made such a motion in the 2006 non-payment case.

By order dated March 30, 2006, the motion was denied by the Hon. Peter D. Wendt on the ground that the motion failed to include a copy of any lease entitling either side to legal fees and because the relief (attorney fees) should be sought in the 2003 non-payment proceeding or by plenary action. Judge Wendt referred the 2006 non-payment case back to Judge Lebovits for trial.

No appeal from Judge Wendt's order was taken. Instead, on May 25, 2007, petitioners filed an Article 78 proceeding in this court against Judge Wendt, Judge Lebovits and 736 Riverside Dr., LLC, seeking an order directing an immediate hearing in the 2006 non-payment case on the merits of petitioners' counterclaim for attorney fees. That proceeding was assigned to this part, and by order dated May 31, 2007, the 2006 non-payment case was temporarily stayed pending the hearing of the petition, scheduled for June 22, 2007.

On June 15, 2007, the parties appeared before Judge Lebovits in the 2006 non-payment case. Petitioners' then attorney, Ronald Hart, Esq., was not present in the courtroom, but appeared by telephone. At this conference, the parties asked for Judge Lebovits' assistance in settling the 2006 non-payment action, indicating that they were very close to a settlement. In response, Judge Lebovits indicated that he was in a "peculiar position" because he had been sued by petitioners in the Article 78 mandamus proceeding, but was being asked to resolve the non-payment case at the same time; that it "presents a rather serious ethical conundrum on [his] part" (6/15/07 Tr. at 47-48). He further stated on the record that, in his opinion, petitioners' decision to file an Article 78 proceeding against him and Judge Wendt, rather than moving for reconsideration of the orders or the filing of an appeal, was "frivolous and so sanctionable that it shocks the conscience," and that he was thinking about filing a disciplinary charge against Mr. Hart personally. *Id.* at 48-49. Despite these pronouncements, petitioners' counsel continued to press for his assistance in settling their dispute. In response, Judge Lebovits offered to put the matter over to June 20, 2007.

On June 20th, at the start of the conference, Judge Lebovits clarified on the record that he had no intention of filing a disciplinary complaint against Mr. Hart. The parties then presented Judge Lebovits with a written stipulation settling their dispute, which included a provision in ¶9 whereby the parties agreed to discontinue the Article 78 mandamus pro-

ceeding with prejudice. Judge Lebovits stated that he had difficulty "so ordering" a stipulation that includes a provision in which the parties were agreeing to discontinue a lawsuit in which he was a party. He suggested that the parties prepare a separate stipulation discontinuing the Article 78 proceeding, which he would not sign, and that he "so order" the existing stipulation, but specifically exclude paragraph 9. Both sides agreed to this procedure. In fact, on the first page of the Stipulation, it clearly states under Judge Lebovits' signature "(except that paragraph 9 is not so-ordered GL) ." The matter was then adjourned until later that day for the parties to prepare a separate stipulation discontinuing the Article 78 mandamus proceeding. When the parties re-appeared before Judge Lebovits later that day, he so-ordered the Stipulation, as indicated above, and sent the 2006 non-payment case to Part X, the expediter, for trial on July 17, 2007, a date to which the parties agreed. The separate stipulation discontinuing the Article 78 proceeding was filed in this court the following day, June 21, 2007.

The Stipulation settled the petitioners' claims for legal fees "to date" for the sum of $190,000, and makes clear that this settlement applies to the legal fees incurred up to that date in the 2006 non-payment proceeding. In addition, the Stipulation provides for the withdrawal of petitioners' counsel, Mr. Hart, and that petitioner William Kyle [2] elects to

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[2] The Stipulation makes no provision regarding the future representation of petitioners Mary Kyle or Kathryn

proceed *pro se* in the matter or have until July 16, 2007 to obtain new counsel. The Stipulation was signed by both petitioners' counsel and by William Kyle. Indeed, Judge Lebovits specifically questioned petitioner William Kyle, who was present in court on June 20, 2007 as to whether he wanted to settle the attorney fee issue and William Kyle responded that he did. The $190,000 was subsequently paid.

Thereafter, in an effort to overturn the Stipulation, petitioner William Kyle filed an order to show cause, *pro se*, in the 2006 non-payment case to disqualify Judge Lebovits retroactively to May 24, 2007 on the ground that Judge Lebovits took part in an action in which he was a party, in violation of Judiciary Law §14. Judge Lebovits declined to sign the order to show cause, writing thereon that it was the most outrageous document he has seen in his "5 1/2 years of service on the bench."

Petitioners, represented by new counsel, Robin H. Kyle, Esq.—William Kyle's brother—then moved to vacate the Stipulation by motion returnable on August 13, 2007. They argued to Judge Lebovits that: (1) he had no authority to "so order" the Stipulation while the Supreme Court's stay was in effect; (2) he had a conflict of interest because he had been sued in the Article 78 mandamus proceeding; (3) he coerced petitioners' prior counsel,

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Gilbert, who are represented to be William Kyle's wife and roommate, respectively.

Ronald Hart, into signing the Stipulation by threatening him with disciplinary action; and (4) that Kathryn Gilbert and Mary Kyle did not know about the Stipulation and never received any part of the $190,000. Judge Lebovits denied the motion in an order dated August 13, 2007, stating that the motion was frivolous and possibly sanctionable.

On August 10, 2007, petitioners-through their new counsel-filed the instant order to show cause in this court seeking the above-referenced relief.

Thereafter, Judge Lebovits withdrew his August 13, 2007 decision and order and issued a second decision and order dated August 24, 2007, in which he withdrew his prior direction that a sanctions hearing be held on October 9, 2007. Instead, he directed the parties to appear on that day in Part X for trial.

Petitioners' motion is denied in its entirety, and for the following reasons, the court finds that the instant order to show cause and supporting papers are grossly frivolous and, thus, sanctionable.

Petitioners argue that the Stipulation was "so ordered" by Judge Lebovits in violation of this court's stay, and that no court conferences should have been held in the 2006 non-payment case after this court issued a stay on May 31, 2007. However, as the transcripts of the Civil Court proceedings held on June 15 and 20, 2007 make abundantly clear, Judge

Lebovits presided over these settlement conferences only at the behest of petitioners' then counsel, who could have objected at any time on the grounds that the 2006 non-payment action was completely stayed and should be adjourned until after June 22, 2007. The June 15, 2007 transcript suggests that Judge Lebovits was not aware of the Supreme Court's stay:

> THE COURT: Okay, I—I'm in a peculiar position with all of this, I think, because I'm-uh, I'm asked to, uh, assist in perhaps settling this case, or if not, in trying this case. And yet at the same time you have sued me. Uh, that—that, as far as I'm concerned, present a rather serious ethical conundrum on my part because it's rare to be sued and still have a case pending before me when in the context of suit *I don't think you even ask for a stay of these proceedings.* So I'm being sued and asked to resolve everything all at the same time. . . .
> 6/15/07 Tr. at 47-48 (emphasis added).

In response, Mr. Hart did not correct the Judge and advise him of the Supreme Court stay. Rather Mr. Hart responded "I'm listening," (*id.* at 48), "Judge, I'm asking for your assistance" (*id.* at 55), and he proceeded to discuss issues regarding a proposed settlement. At least twice on June 15, 2007, rather than argue that the 2006 non-payment case was stayed, Mr. Hart announced that he was ready to go to trial. *Id.* at 53, 55. It is beyond the pale that a party, having obtained a stay of a judicial proceed-

ing in a proceeding in which the Presiding Judge is named as a respondent, then lobbies the same presiding judge to assist in settling the case and then, later on, after having accepted the proceeds of the settlement, argues that the judge acted wrongfully in assisting the parties in facilitating a settlement.

It is important to note that on June 20, 2007, the parties presented Judge Lebovits with a written stipulation settling the attorney fee issue-the subject of the Article 78 mandamus proceeding-and that petitioners were prepared to discontinue the mandamus proceeding with prejudice. However, before Judge Lebovits "so ordered" the Stipulation, the parties presented him with a signed copy of a separate written stipulation discontinuing the Article 78 proceeding, and represented that it would be filed with the Supreme Court. Thus, Judge Lebovits took no official action in the non-payment cases until he was assured that the action in which a stay had been issued was voluntarily discontinued by the party who sought the stay in the first instance.

Under the circumstances presented, there was no violation of this court's stay order.

Petitioners also claim that Judge Lebovits was disqualified from presiding over the non-payment cases by virtue of Judiciary Law § 14, and that this section authorizes this court to nullify a stipulation settling an attorney fee issue, after the money has been paid.

Section 14 of the Judiciary Law provides, in pertinent part: "A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree." If disqualification under the statute were found, prohibition, not mandamus, would lie. However, a judge's decision not to disqualify himself, based on a claim that his impartiality might reasonably be questioned, is not subject to Article 78 review. *Johnson v. Hornblass*, 93 A.D.2d 732, 733 (App. Div 1st Dep't 1983).

Judge Lebovits was not a party to the non-payment cases, and had no interest in the success or defense of those cases, such that legal disqualification under Judiciary Law §14 was warranted. However, as he correctly recognized, having been sued by the tenants in an Article 78 mandamus proceeding, his impartiality towards those litigants might reasonably be questioned. Accordingly, he appropriately recused himself from the 2006 non-payment case. He only presided over settlement conferences at the behest of the tenant's (petitioners') attorney, who repeatedly advised Judge Lebovits that the cases were being settled. There is no basis in law or fact for this court to vacate the Stipulation on the basis of any violation of Judiciary Law § 14.

The court notes that the Stipulation was signed by the attorneys for both parties in the non-payment proceeding. Thus, it might well have been enforceable even if Judge Lebovits had "so ordered" it.

The cases upon which petitioners rely are distinguishable. *Harkness Apartment Owners Corp. v. Abdus-Salaam* (232 A.D.2d 309 [1st Dep't 1996]), involved an Article 78 proceeding seeking a writ of prohibition, and not mandamus. Although the prohibitive writ was granted, the respondent justice had worked with the attorney general's office on the precise subject matter of the litigation prior to becoming a Supreme Court Justice, in violation of Judiciary Law § 14's prohibition of a judge presiding over any case "in which [s]he has been attorney or counsel." The case lacks any similarity to the case at bar.

Petitioners also rely on *Matter of Beer Garden, Inc. v. New York State Liquor Authority* (79 N.Y.2d 266 [1992]), which, similar to *Harkness,* involved the refusal of a State Liquor Authority (SLA) Commissioner to recuse herself despite her involvement in prosecuting the case as SLA counsel prior to becoming a commissioner.

Finally, petitioners make very serious and disturbing allegations that Judge Lebovits, acting in concert with Judge Wendt, coerced an unfair settlement of the attorney fee issue by threatening their former attorney, Ronald Hart, with disciplinary

action for having filed, in Judge Lebovits' opinion, a frivolous mandamus proceeding. Notably, petitioners have not submitted an affidavit from their prior counsel in support of their application in this proceeding, and have failed to explain why they failed to do so. The only factual support for this claim is the statement in the Verified Petition that "Mr. Hart was so distraught at prospect [sic] of being the target of grievance disciplinary proceedings (initiated by a member of the Civil Court of the City of New York no less) he instructed his clients that he was going to drop the Mandamus matter forthwith." Pet at ¶27. Yet, Judge Lebovits made it very clear to Mr. Hart on June 20, 2007 that he had no intention of filing disciplinary charges against him. Contrary to Mr. Kyle's assertions, neither Judge Lebovits nor Mr. Hart "waived" the petitioners' right to counterclaim in the 2006 non-payment case for attorney fees. Indeed, there is nothing in the record suggesting that petitioners were forced to accept $190,000 in legal fees from their landlord for settlement of their outstanding legal fee claim in the 2003 non-payment case and any legal fees incurred "to date" in the 2006 non-payment case, or that Judge Lebovits had any involvement in negotiating the terms of the Stipulation, other than to announce on June 20th that he could not "so order" the paragraph, which provided for the discontinuance of the Article 78 proceeding.

This is not a situation where an attorney was allegedly acting without the knowledge and consent of his clients. Judge Lebovits specifically questioned

petitioner William Kyle, who was present in court, about whether he wanted to settle. "[I]s this what you want to do?" the court asked. William Kyle answered: "Yes. Uh, this is what we're going to do. I want to do it." 6/20/07 Tr. at 57. After a few minutes, the court said to William Kyle, "Tell me what you want to do," and William Kyle said, "Don't start tearing up everything. This is fine." *Id.* at 60.[3]

In addition to the fact that the petition lacks any basis in law or fact, the court finds that petitioners' present attorney, Robin H. Kyle, Esq., has engaged in the following additional frivolous conduct in connection with this proceeding that warrants the imposition of sanctions pursuant to 22 NYCRR 130-1.1.

First, Mr. Kyle's affirmation and supporting memoranda of law are replete with insulting and disingenuous readings of the record in the Civil Court cases. Mr. Kyle deliberately misquotes the June 15th and 20th transcripts of the proceedings in Civil Court by adding his own punctuation and emphasis, by selectively truncating quotes, and by mis-citing page references. At paragraph 11 of his

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[3] William Kyle is not an ordinary litigant, rather it was represented to both Judge Lebovits and to this court, that William Kyle is a law school graduate. Thus Judge Lebovits may have been justified in assuming that William Kyle understood the legal ramifications of the Stipulation a little more than the average layperson.

supporting affirmation, Mr. Kyle quotes the record as follows:

THE COURT: . . . I think your lawsuit [the Article 78] is frivolous, because I think that your lawsuit is sanctionable. And I think that your lawsuit could lead you to go the disciplinary committee . . . And yet I am thinking about filing a disciplinary charge against you personally! So I don't think I have to [sic] wherewithal to handle this-this matter. And I don't know, because I have to speak to my attorney, uh, before I file disciplinary charges against you . . . I-I-I-I wonder, frankly, if you're capable of doing *this*, what else you're capable of!

So I essentially trust you not! I don't trust you even a little bit. Okay, have you heard me loud and clear?

MR. HART: Yes, Judge, I have.

(6/15/07 Tr. at 49).

However, in reality, this is a truncated excerpt from pages 48 and 49 of the transcript and the actual transcript contains no exclamation points and no emphasis.[4] As stated in the affidavit of Lawrence

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[4] The full text of this portion of their exchange is:

THE COURT: Okay, I—I'm in a peculiar position with all of this, I think, because I'm-uh, I'm asked to, uh, assist perhaps in settling this case or, if not, in trying this case. And yet at the same time you have sued me. Uh, that—that, as far as I'm concerned, presents a rather serious ethical conundrum on my part because it's rare to be sued and still have a case pending

[Continued from footnote *supra*.]

before me when in the context of suit I don't think you even ask for a stay of these proceedings. So I'm being sued and asked to resolve everything all at the same time. Let-let me tell you, because I—I don't know how to express this more clearly that this puts me in a very uncomfortable position. It's uncomfortable, because I think that your lawsuit is frivolous, because I think that your lawsuit is sanctionable. And I think that your lawsuit could lead you to go to the disciplinary committee. And I not—were I not precisely [a litigant] here, I would say that your lawsuit is so frivolous and so sanctionable that it shocks the conscience. It shocks—hello?

MR HART [sic]: Yes, I'm here, Judge. I'm listening to you.

THE COURT: Okay, It shocks my conscience to believe that you think that the way to gain leverage in your case is to sue me and Peter Went [sic]. And it shocks my conscience to think that your solution instead of appealing or asking for reconsideration is to go to [60 Centre St.]. It is shocking to me because I was told by you that the case would be settled last week. And then I was told by you that the case would be settled today. And so I have instructed my attorney to answer and to go full blast defending me in the litigation at [60 Centre] Street. And yet I am thinking about filing a disciplinary charge against you personally. So I don't think that I have the wherewithal to handle this-this matter. And I don't know, because I have to speak to my attorney, uh, before I file disciplinary charges against you, uh, what's going to happen with the Article 78 and-and-and-and that just begins the tip of the iceberg about my thoughts, because my thoughts continue on and on. I-I-I-I wonder, frankly, if you're capable of doing this, what else you're capable of. So I essentially trust you not, I don't trust you even a little bit. Okay, have you heard me loud and clear?

MR. HART [sic]: Yes, Judge, I have.
6/15/07 Tr. at 47-49.

It shocks my conscience to believe that you think that the way to gain leverage in your case is to sue me and Judge Peter Went

McCourt, Esq., counsel for 736 Riverside Dr., LLC, Judge Lebovits never raised his voice and conducted himself in a calm and judicious manner at all times. In addition, in the middle of this quote, Judge Lebovits explained why he thought the Article 78 was frivolous:

In his supporting memorandum of law, Mr. Kyle again inserts exclamation points in order to support his claim, made without any personal knowledge, that the Judge's comments to Mr. Hart were made "thunderously." *See* Pet Br at 21-22. Other instances of Mr. Kyle adding punctuation and/or emphasis to quotes from the record can be found in his affirmation. *See* Kyle Aff at ¶¶ 12, 17, 19.

Second, Mr. Kyle mis-interprets the Stipulation, which does not provide for the waiver of any statutory right pursuant to Real Property Law § 234 to recover attorney fees in the 2006 non-payment case. Further, Mr. Kyle makes unsupported claims

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[Continued from footnote *supra*.]

[sic]. And it shocks my conscience to think that your solution instead of appealing or asking for reconsideration is to go to [60 Centre Street]. It is shocking to me, because I was told by you that the case would be settled last week. And then I was told by you that the case would be settled today.

*7 6/15/07 Tr. at 48-49.

that petitioners were "forced" into accepting the $190,000 on their attorney fee claim, and that it "will result in the loss of their home" (Pet Br at 31), when, in reality, the 2006 non-payment case has yet to be tried. Mr. Kyle also takes issue with the fact that the check for $190,000 was made payable to Mr. Hart (*id.* at 32), suggesting that there was some prior arrangement with Mr. Hart about who would ultimately receive that money, whether as reimbursement for bona fide attorneys' fees paid or otherwise. That is a dispute that petitioners must take up with their prior counsel, and does not, as Judge Lebovits correctly observed, justify setting aside the Stipulation.

Finally, Mr. Kyle's memoranda of law are replete with outrageous, overblown and insulting comments about both Judges Lebovits and Wendt that are completely unsupported by the record and lack any good faith basis whatsoever. For example, Mr. Kyle accuses Judge Lebovits of having "brought down the gavel in his own case," "selling tenants' statutory protections," and "using the prestige of his office for personal advantage in pending litigation." Pet Br at 1. He further accuses Judge Lebovits of having "orchestrated appearances" in the Civil Court cases "for the sole purpose of vitiating" the Article 78 mandamus (*id.*) and "fierce and discourteous lobbying" to neutralize the Article 78 mandamus proceeding" (*id.* at 23). In fact, record reflects that

the 2006 non-payment case was adjourned, with the parties' consent, based on their repeated assurances to Judge Lebovits that the matter was close to being settled. 6/15/07 Tr. at 49-50, 52, 53-54. Finally, he accuses Judge Wendt of having acted in concert with Judge Lebovits solely because Judge Lebovits spoke to Judge Wendt by telephone on June 15, 2007 to advise him of the status of the 2006 non-payment case and possible settlement. *See* 6/15/07 Tr. at 24-25.

Mr. Kyle contends that Judge Lebovits demonstrated bias and prejudice against Mr. Hart by referring to him as "sir" at one point. *See* 6/15/07 Tr. at 49 ("Okay. What, now, sir, are your thoughts in response to my obviously pretty strong feelings toward you, toward your litigation and everything else?"). Mr. Kyle suggests that this is akin to a Judge engaging in prejudicial behavior by addressing a lawyer for one of the parties by an honorific title such as "judge," "senator" or "ambassador." *See* Commentary 3.2, Code of Judicial Conduct Canon 3(b)(4).

The numerous factual and legal misrepresentations detailed above, the baseless nature of the petition, the disrespect directed at two judges of the Housing Court and the petitioners' obvious intent to delay the resolution of the underlying 2006 non-payment proceeding, all constitute frivolous conduct under 22 NYCRR 130-1.1, justifying an award of sanctions. Rule 130-1.2 requires the court to state the reasons why the court found the amount imposed

to be appropriate. Thus, this court finds the sum of $1,000 to be appropriate. The court hopes that this sanction "will sting sufficiently to communicate its demand for improved professional conduct without imposing excessive hardship" on Mr. Kyle. *Candolfi v. New York City Transit Authority*, 156 Misc.2d 964, 970 [Civ Ct, Kings County 1992]). Accordingly, the court sets the amount of sanctions imposed on Robin H. Kyle, Esq. at $1,000.00.

For the foregoing reasons, it is hereby

ORDERED that the petition is denied and the proceeding dismissed; and it is further,

ORDERED that respondent 736 Riverside Dr., LLC's cross motion for sanctions against the petitioners and their attorney pursuant to 22 NYCRR 130-1.1 for knowingly engaging in frivolous conduct is granted to the extent of ordering Robin H. Kyle, Esq. to pay a donation in the amount of $1,000 to The Lawyers' Fund for Client Protection; and it is further

ORDERED that, the clerk of the court shall enter judgment accordingly.

Dated: October 26, 2007

J.S.C.

HERMAN CAHN, J.

APPENDIX I:

Supreme Court of the State of New York
Appellate Division—First Department

In Re: Matter of William KYLE, et al., Petitioners,
v.
Hon. Gerald LEBOVITS, et al., Respondents

58 A.D.3d 521, 870 N.Y.S.2d 360

January 20, 2009

DECISION OF APPELLATE DIVISION
AFFIRMING DISMISSAL

Background: Plaintiffs brought article 78 proceeding seeking a writ of mandamus directing judge to disqualify himself *nunc pro tunc* from all matters relative to two pending nonpayment proceedings. The Supreme Court, New York County, Herman Cahn, J., 17 Misc.3d 1124(A), 2007 WL 3275204, denied the petition. Plaintiffs appealed.

Holding: The Supreme Court, Appellate Division, held that plaintiffs were not entitled to a writ of mandamus.

Affirmed in part, and dismissed in part.

Record did not support a finding that judge was "interested" in the proceeding and thus statutorily required to recuse himself, and therefore plaintiffs had no clear right to the remedy of a writ of mandamus directing judge to disqualify himself *nunc pro tunc* from all matters relative to two pending nonpayment proceedings. McKinney's Judiciary Law § 14.

Kyle Law Firm, New York (Robin H. Kyle of counsel), for appellants.

Andrew M. Cuomo, Attorney General, New York (Richard Dearing of counsel), for Hon. Gerald Lebovits, respondent.

Order, Supreme Court, New York County (Herman Cahn, J.), entered November 1, 2007, insofar as it denied the petition and dismissed the proceeding brought pursuant to CPLR article 78 seeking a writ in the nature of mandamus directing respondent judge to disqualify himself, *nunc pro tunc* to June 4, 2007, from all matters relative to two pending nonpayment proceedings, unanimously affirmed; appeal from the part of the order that imposed sanctions in the amount of $1,000 upon nonparty attorney Robin H. Kyle for engaging in frivolous conduct, unanimously dismissed; all with costs.

The record does not support a finding that Judge Lebovits was "interested" in the proceeding and thus required to recuse himself pursuant to Judiciary Law §14. Absent a legal disqualification under Judiciary Law § 14, petitioners had no clear right to the remedy of mandamus (*see Matter of Alizia McK.*, 25 A.D.3d 429, 808 N.Y.S.2d 657 [2006]). Moreover, they had and have other adequate remedies at law by which to seek the retroactive disqualification of the judge (*see Matter of Herskowitz v. Tompkins*, 184 A.D.2d 402, 402-403, 585 N.Y.S.2d 386 [1992], *appeal dismissed* 80 N.Y.2d 1023, 592 N.Y.S.2d 671, 607 N.E.2d 818 [1992]).

The appeal from the part of the order that imposed sanctions against nonparty attorney Kyle must be dismissed because Kyle did not file an appeal from the order within the 30-day period established by CPLR §5513 (*see Steinhardt Group v. Citicorp*, 303 A.D.2d 326, 757 N.Y.S.2d 537 [2003], *lv. denied* 100 N.Y.2d 506, 763 N.Y.S.2d 811, 795 N.E.2d 37 [2003]), and petitioners are not aggrieved by that part of the order (*see Scopelliti v. Town of New Castle*, 92 N.Y.2d 944, 681 N.Y.S.2d 472, 704 N.E.2d 226 [1998]). Were we to consider the issue, we would perceive no basis for disturbing the court's exercise of discretion in sanctioning Kyle.

We have considered petitioners' remaining arguments and find them unavailing.

Entered: January 20, 2009

APPENDIX J:

Supreme Court of the State of New York
Appellate Division—First Department

BRIEF FOR PETITIONES
July 2, 2008

ARGUMENT

POINT I: AS PRIOR MANDAMUS WAS IN NO WAY "FRIVOLOUS", AS JUDGE HAD A CLEAR INTEREST IN THE STIPULATION HE "SO-ORDERED" WHICH VITIATED THE PRIOR MANDAMUS

(A) AS THE PRIOR MANDAMUS PROCEEDING WAS IN NO WAY "FRIVOLOUS", RESPONDENT JUDGE'S HAD PROFOUND INTERESTS IN ITS "SETTLEMENT"

Counsel for Riverside characterized the prior Article 78 as "frivolous", but has been unable to articulate any legally coherent basis for same. Respondent Judge fairs no better. His critiques to date—e.g., "It is law 101 that that a lawyer does not file an Article 78 instead of appealing. Truth is a defense that cannot be turned on the court"—have no basis in law whatsoever. This is because the prior Mandamus isolated procedural conduct in question

dead-to-rights. To expose it as somehow "frivolous" is a legal and factual impossibility.

Below, Petitioners argued Respondent Judge and his colleague, the Honorable Peter D. Wendt, intentionally violated [Petitioners'] Constitutional right to trial through at least [14] ministerial errors of law—all of which violated Article 7's mandatory injunctions. [Detailed] in moving papers below, they are more handily illustrated as follows:

	Respondent's Ruling	**Actual Rule of Law**
1	*Lease not annexed to motion to amend for attorneys fees, so motion to amend denied*	Movant need only annex document "not already in possession of court." CPLR §2214(c).
2	*Counterclaims in Civil Court are governed by §3011*	Pursuant to CPLR §101, Counterclaims in Civil Court are governed by CCA §907.
3	*§3011 requires a counterclaim to be designated "as such."*	§3011 only requires: "*there shall be a reply* to a counterclaim *designated as such.*"
4	*Failure to denominate ¶6 a counterclaim was only correctable through motion to amend. CPLR §3025.*	"At *any* stage of an action the mistake, omission, defect or irregularity *shall* be disregarded." §2001.

	Respondent's Ruling	**Actual Rule of Law**
5	*Counterclaims must be "designated"*	No "designation" requirement. CCA §907
6	*This court must deny [tenants'] motion [for summary judgment on §234] because Respondents have not asserted a counterclaim . . ."*	"The motion shall be granted if, upon <u>all</u> the papers and proof submitted, the cause of action or defense shall be established sufficiently to war-ant the court as a matter of law in directing judgment in favor of any party. CPLR §3012(b)
7	*This Court [was] precluded from ruling on Respondents' <u>potential</u> counterclaim for fees to 736 Riverside Drive's petition. . .*	No such thing as a "potential counterclaim" if "tenant is prevailing party.' *Dowling v. Yamashiro*

	Respondent's Ruling	**Actual Rule of Law**
8	*CPLR §3011 requires a counterclaim to be designated 'as such.'"*	CPLR §3026 provides: 'Pleadings *shall* be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced."
9	*CPLR §3011 requires a counterclaim to be designated 'as such.'"*	"CPLR *shall* govern "except where the procedure is regulated by inconsistent statute." CPLR §101
10	*CPLR §3011 requires a counterclaim to be designated 'as such.'"*	CPLR §2101(f): "A defect in the form of a paper shall be disregarded by the court, and leave to correct shall be freely given."
11	*As "petition contained no claim for legal fees" the tenants may not counterclaim under §234 for attorneys' fees.*	"If a substantial right of a party is not prejudiced, defects *shall* be disregarded by the court, and leave to correct *shall* be freely given." CPLR §2101(f).

	Respondent's Ruling	**Actual Rule of Law**
12	*As "petition contained no claim for legal fees" the tenants may not counterclaim under §234 for attorneys' fees.* [R.12].	"[T]enant's entitlement to attorneys' fees [does not] depend on landlord's request for attorneys' fees." *815 Park Owners Inc v. West LB Administration, Inc.*, 119 Misc. 2d 671 (1983).
13	*Because "petition herein contained no claim for legal fees whatsoever" the tenants may not counterclaim for attorneys' fees.*	"The statute makes the existence of the lease clause *the only condition precedent* to the tenant's reciprocal right." *Jocar Realty Co. v. Galas*,176 Misc.2d 534, (N.Y. City Civ. Ct., 1998).
14	Petitioners must *"counterclaim clearly"*	"Pleadings *shall* be liberally construed" §3026

POINT IV: PETITIONERS' CHARACTERIZATIONS OF RESPONDENT'S PROCEDURAL CONDUCT HAVE A RATIONAL BASIS IN THE RECORD THEREFORE THE IMPOSITION OF SANCTIONS WAS UNJUST AND INAPPROPRIATE

Sanctions were imposed primarily for "misquoting transcripts", "misinterpreting the stipulation, submitting papers "replete with insulting comments" and accusing Respondent Judge of "'orchestrating appearances' to vitiate the Article 78 Mandamus" [id.]; asserting Respondent Judge demonstrated bias through the honorific "Sir" and "disingenuous readings of the record in the Civil Court cases."

(A) *Misquoting*

Contrary to the decision, the OSC was a fully integrated document containing *both* the affirmation's "truncated quotes" *and* the *full* transcripts annexed at Exhibits "E" and "F" [R. 90 and 125] incorporated by reference. The decision is written as if Petitioners used truncated quotes by *themselves*, i.e., to mislead the Court, while the full transcripts were somehow unearthed independent of Appellants' submission, thereby unmasking some unlawful charade.

However, the offending quote (¶11 [R. 50]) properly employed punctuating ellipsis substituting any allegedly purloined text. The ellipsis after "COURT", "committee" and "you" [R. 50] obviously represent missing text. Why? Because ellipsis indicates the "omission of words needed to complete a construction or sense."[5] So the presence of ellipsis in the text cited in the decision cannot be misleading because ellipsis is "a series of three dots that indicate the missing of quoted words"[6] which "let the reader know that something is missing," the quote cited by the lower Court is not "disingenuous" Nor does the passage "deliberately misquote."[7]

In the defamation context, the IAS Court's approach was soundly rejected by the U.S. Supreme Court. *Masson v. New Yorker Magazine*, Inc. 501 U.S. 496, 111 S.Ct. 2419, 115 L.Ed.2d 447, 59 USLW 4726, 18 Media L. Rep. 2241 (1991). Altered quotations are blameworthy *only* if such alterations effect a "material change in the statement's meaning." (523 U.S. 496). As Justice Kennedy explains:

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[5] *Pocket Oxford Dictionary* (Clarendon Press Oxford University [1992]).

[6] *The New York Public Library Writer's Guide to Style and Usage*, (Harper Collins Publishers, p. 280 [1997]).

[7] *Grammatically Correct: The Writer's Essential Guide to Punctuation, Spelling, Styles, Use and Grammar*. Anne Stillman (Writer's Digest Books Cinn. OH. [1997]).

> While the use of quotations to attribute words not in fact spoken is important to that inquiry [of intentional "falsity"], the idea that any alteration beyond correction of grammar or syntax by itself proves falsity is rejected. *Id.*

For if, as Justice Kennedy observes, "a defendant may be able to argue that quotations should be viewed by the [reasonable] reader as nonliteral reconstructions. . ." then for Justice Kennedy, the pivotal test is whether, "the reasonable reader would understand the quotations to be nearly verbatim reports of statements made by the subject."[8] Given its rather conventional use of ellipsis, ¶11 easily passes *The New Yorker* test. A reasonable reader would interpret the ellipsis as, "a series of three dots that indicate the missing of quoted words."[9]

(B) *Page References*

The sanction for "misciting page references" apparently refers to the fact that ¶11 referenced the excerpt to "Page 49 line 1-25") when in reality—as the IAS Court "discovered"—the lines run from page 48 *through* 49. (Decision R.24]. But at ¶ 17 [R. 52] the same language is accurately referenced as "Id.,

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[8] Id., 501 U.S. 513.

[9] p. 280 *The New York Public Library Writer's Guide to Style and Usage*, (Harper Collins Publishers [1997]).

pp. 48 – 49" at [¶17 R. 17]: simply turn the page and the full citation is revealed. Moreover, no case exist imposing sanctions for incorrect citations or page reference or typos.

(C) *Truncating*"

Truncating, is not misleading unless it changes the meaning of the *un-truncated text*. Such as saying the transcript states "found guilty," when in reality the transcript states "found not guilty." The deleted/truncated "not" completely changes the meaning of the text and thereby misleads. But there is no misleading *truncated* text cited in the IAS decision because none exist in Appellants' papers.

Defined as to "abbreviate by or if by cutting off" [10] or "shorten"[11], *truncating* is what lawyers and Judges regularly do to keep their papers at a reasonable length. The method has no moral or ethical stigmata of which the undersigned is aware. Lest the garden variety Order to Show Cause become a full-blown Brandies Brief, *truncation* is, of course, indispensable to the profession both as a matter of practicality and rhetorical effect.

As such, counsel pleads guilty to "*truncating*" the transcript, and also to having annexed the entire record for the IAS Court's reference. On the other hand, Appellants emphatically deny any intent to

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[10] *Webster's Third New International*, [1961]).

[11] *Pocket Oxford Dictionary*, [8th Ed. 1992]).

mislead and further deny that the OSC "truncated" citations were in any way shape or form even capable of misleading.

(D) "*Insults*"

At page 12 of the decision [R. 24], the IAS Court says:

> Mr. Kyle's affirmation and supporting memoranda are replete with insulting and disingenuous readings of the record. [R. 24].

As "insults" (in papers allegedly "replete" with such invective) are cited in the decision, I would point to the IAS's Court attempt at three such examples:

> Mr. Kyle accuses Judge Lebovits of having "brought down the gavel in his own case," "selling tenants' statutory protections," and "using the prestige of his office for personal advantage in pending litigation." Pet Br at 1. [R. 26].

(i) *Brought down the gavel . . .*

While "insult" is defined as to treat with "contempt or indignity by word,"[12] herein *gavel* is a

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[12] *Webster's Third New International Dictionary* (*Encyclopedia Britannica* (1966).

figure of speech suggesting a likeness or analogy by way of an implied rather than explicit comparison. It is an obvious metaphorical extension of James Madison's Federalist Paper Number 10: "No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."[13] In "so ordering" the June 20th, 2007, stipulation—which effectively ended his role as litigant—Respondent Judge brought down the gavel in his own case—a perfectly sound, logical, (and relatively modest) legal metaphor given the facts.

(ii) *Selling Tenants' Protections*

To say "Mr. Kyle accused [Respondent Judge] of . . .'selling tenants' statutory protections . . .'" [R. 26], is profoundly inaccurate. The exact words were: [Respondent Judge was] unlawfully *presiding over* the selling off of the Petitioners' statutory rights without two of the Petitioners even in the Court-room—in violation of a Supreme Court stay no less.

The sentence simply asserts six irreducible, un-contradicted facts of this case: (1) [Respondent Judge] presided; (2) Mr. Hart did the selling; (3) Appellants did the losing; (4) the landlord did the buying; (5) the deal was "so-ordered" during a Supreme Court stay of proceedings and (6) Kathryn

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[13] *The Federalist*, No. 10, at 59 (James Madison) (Jacob E. Cooke ed., 1961).

Gilbert and Mary Kyle—whose rights were lost without their knowledge, participation or consent—were not in the courtroom. It's *that* simple.

(iii) *"Personal Advantage"*

Another basis for the sanctions is that, "Mr. Kyle accuses [Respondent Judge] of " '. . . using the prestige of his office for personal advantage in pending litigation.' Pet Br at 1." [R. 26]. But only through the "prestige" of judicial office can someone (in a pending suit to which he is a named party) conduct *ex parte* hearings in and unilaterally adjourn an interrelated matter in violation of a Supreme Court stay. And having assumed the June 4th → 8th, 2007, *ex-parte* adjournment [R. 88] was not done for *public* "advantage", and as the proceeding had no discernable charitable purpose, I assumed—and quite reasonably I think under the circumstances—it was for the *personal* advantage of the one who ordered it: Respondent Judge.

(E) *"Sirs," "Misters," and Judicial Condescension*

On the return date of the OSC, Appellants' counsel several times referred to the IAS Court as "Sir" [R. 464. line 14]. Yet the IAS Court never refers to *any* counsel appearing before him as "Sir" [R. 457 – 474] as in: "I told you, Mister, and you will speak only after I have spoken . . ." [R. 312]. This is because, as a general axiom of common courtesy, superiors simply do not address their *subordinates* as

"sir" or—clearly more offensive still—"Mister." Frankly, such use is rude, ill-mannered and—especially in the context of a judicial proceeding—consummately prejudicial.

However, at page 15, umbrage is taken to our objection to Respondent Judge's referring to Appellants' counsels as "Mister" and 'Sir': [R. 27]. But the decision never explains how the suggestion is without basis or even wrong. [See R. 27]. Therefore, as the charge perfectly reflects the prohibition laid down in Commentary 3.2, Code of Judicial Conduct Canon 3(b)(4), and the decision never analyzed my allegation through Canon 3, it's assumed that when a Judge refers to an attorney as "Sir" the usual norms of courtroom etiquette—and etiquette generally—apply.

H.L. Mencken's classic and definitive, 3-volume, magnum opus, *The American Language* (1936) points out: In the United States, "Sir" is a sensitive noun and depending on the circumstances is often a rebuke as in: "Addressing an inferior to whom a sharp order is given, as 'Do this or that, *sir*!'"[14] According to Mencken: "The English often remark another American habit that strikes as strange, to wit, the frequent use of *Sir*. They seldom

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[14] *The American Language: An Inquiry Into the Development of English in the United States*, H.L. Mencken, (1966) Alfred Knoph, New York; Supplement I; page 555.

use it save in addressing indubitable superiors, especially royalty . . ." [15]

Therefore, the word's potency for ironic contempt is commonly understood. As a "short form of *sire* which originally came from the Latin *senior*,"[16] I have never seen the word's use cited approvingly when directed at a subordinate by his *superior*. Common usage dictates this is simply rude.[17]

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[15] Id., 555.

[16] *Word Nerd*, Barbara Ann Kipfer, (Source-books Naperrville Ill., [2007]).

[17] One undisputed master of the language was renown post-war screen writer Frank Nugent who re-worked the James Warner Bellah magazine short story "Massacre" into John Ford's classic film *Fort Apache* (1948). The movie features Henry Fonda as a rigid, class-conscious, by-the-book, Indian-hating, anti-Irish racist, West-pointer, Owen Thursday, a Commanding Officer of Fort Apache in Utah's Monument Valley.

Throughout the narrative, Thursday is known for his signature put-down to his officers and subordinates alike whom he slights with the honorific title "Mister" and "Sir." Against, Thursday's abusive references and high-pitched tirades, John Wayne plays the more likable "warmer subordinate to the tense superior officer." [p. 172]. (See Garry Wills: *John Wayne's America: The Politics of Celebrity* (1997).

But as Wills points out, by the film's end, after Thursday's death, Wayne, as next-in-command, essentially transmogrifies into Thursday. Yet, of all the many mannerisms Wayne adopts from his slain and now respected-in-death Commander, directing "Sir" and "Mister" to the men under his command is not, and *will* not, be one of them. Although film critics and cultural historians like Garry Wills regard it as a high-art classic—given the cinematography—*Fort Apache* was a

(F) *Attempts to Delay:* Purported and Actual

Sanctions were also imposed for [Petitioners'] "obvious intent to delay." An intent apparently so "obvious", the IAS Court felt it unnecessary to cite any proof of same save Riverside's allegation (*Breed*, at ¶ 57; [R. 251]). In fact, on the day of trial it was *Riverside* who sought delay *twice* on the record [R. 334, line 22 -25; and R. 367, line 11].

(G) *Illicit Exclamation Points*

There is no known precedent for imposing sanctions for inserting exclaimers. Indeed, "Special Term did not abuse its discretion in denying Plaintiffs' motion to impose sanctions upon defendant for making changes improperly in transcript of his examination before trial." *Jenkins v. Brown*, 50 A.D.2d 925, 377 N.Y.S.2d 613 (App. Div. 2nd Dep't 1975). Moreover, exclamation points don't always imply yelling.

The sanctions herein are best understood as the system's reaction to any effort of recusal, a system which, in the words of a recent court decision is little more than a procedure of "systematic intimidation." "This procedure remains in effect because our judiciary wishes to discourage recusal

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popular film produced for *mass* American audiences. In other words—common usage aside—Thursday's discourteous "Sir" and "Mister" have been part of America's cultural vernacular for 60 years.

motions by a process of systemic intimidation wherein it considers such motions to be a monkey wrench thrown into the works of its turnstile." *People v. Ventura*, Slip Copy, 2007 WL 4170847 (N.Y. Just. Ct., 2007). The same would seem to be especially true respecting efforts at disqualification.

(H) *The IAS Court's Imposition of Sanctions Without Notice and a "Reasonable Opportunity to be Heard" Violates Due Process*

"Due process requires that courts provide notice and an opportunity to be heard before imposing any kind of sanctions." *Nuwesrav. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.2d 92 (2d Cir. 1999); *Bogan v. Royal Realty Company*, 209 A.D.2d 178, 617 N.Y.S.2d 746 (App. Div. 1st Dept. 1994).

In this case the IAS Court's failure to provide notice of a hearing and a reasonable opportunity to be heard are inexplicable due process violations. [R. 28]. Even if sanctions were substantively justified (and they are not), notice and an opportunity to be heard are required by the State and Federal Constitutions.

* * *

CONCLUSION

It is respectfully submitted that the dismissal affronts New York's §14 "liberal construction" tradi-

tional, is contradicted by the official Housing Court website, records, transcripts, docket sheets and—relative to sanctions—even commonly accepted usage of punctuation and the English language. The petition should, therefore, be reinstated and the IAS Court's decision should be reversed.

Dated: June 30th, 2007
New York, New York

Respectfully

Submitted

ROBIN H. KYLE, ESQ.,

APPENDIX K:

Supreme Court of the State of New York
Appellate Division—First Department

Kyle, et al., v.
Hon. Gerald Lebovits, et al.,

OPPOSITION BRIEF OF HON. GERALD LEBOVITS,

October 8, 2009

ARGUMENT
POINT I

THE PETITION FOR MANDAMUS WAS PROPERLY DENIED

Mandamus to compel is an "extraordinary remedy" that lies to compel the performance of "a purely ministerial act where there is a clear legal right to the relief sought." *Matter of Legal Aid Society v. Scheinman*, 53 N.Y.2d 12, 16 (1981). Herein, the petition for mandamus fails for two reasons: because the Tenants had and have an adequate legal remedy for the relief they seek, and because the Tenants have no clear legal right to that relief.

A. Mandamus Will not lie Because the Tenants Have an Adequate Legal Remedy

It is settled law that Mandamus will not issue where the petitioner has an adequate legal remedy for the relief he seeks, whether by appeal or otherwise. *Matter of State v. King*, 36 N.Y.2d 59, 62 (1975) ("The extraordinary remedy will not lie if there is available an adequate remedy at law, of which appeal is but one . . .");

As discussed above, in an abundance of caution and to avoid any conceivable appearance of impropriety, Judge Lebovits ceased to preside over the nonpayment proceedings involving the Tenants no later than August 24th, 2007. Therefore, plaintiffs do not presently seek recusal of Judge Lebovits going forward. Instead, they seek a ruling that Judge Lebovits should have recused himself earlier; in substance, they seek vacatur of judicial acts he performed after the circumstances allegedly warranting recusal arose and before the cases were reassigned. The only act of significance that Judge Lebovits performed in that period was his act in so-ordering the stipulation of settlement on June 20th, 2007. As their various efforts to vacate the stipulation demonstrate, the Tenants apparently have had second thoughts about the amount of money for which they agreed to settle their dispute about past attorney's fees.

Mandamus will not lie here because the Tenants had and have adequate legal remedies by which to obtain vacatur of Judge Lebovits's act in so-ordering the settlement, if such vacatur were warranted. Indeed, the Tenants actually filed in a motion before Judge Lebovits to vacate the so-ordering of the stipulation of settlement three weeks after the stipulation was executed. Judge Lebovits denied that motion on July 9th, 2007, and the Tenants could have appealed that denial, but did not do so. The Tenants also may move for vacatur before the judge that is currently presiding over the nonpayment proceedings, and may pursue an appeal if that relief is denied. The existence of these adequate legal remedies bars any petition for mandamus.

* * *

Dated: New York, New York
October 8th, 2008

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of the State
of New York
Attorney for Respondent the
Honorable Gerald Lebovits, JHC

APPENDIX L:

Supreme Court of the State of New York
Appellate Division—First Department

Kyle, et al., v.
Hon. Gerald Lebovits, et al.,

PETITIONERS' REPLY BRIEF

October 21, 2008

POINT TWO

"ADEQUATE-REMEDY" IS INAPPLICABLE WHERE THE DUTY TO BE COMPELLED IS A CONSTITUTIONAL DUTY

Under §14, *adequate-remedy* is a non-starter. If Article 78 jurisprudence is clear on anything, it is crystalline that "the CPLR provisions that an Article 78 proceeding must not be used [if] a determination can adequately be reviewed by appeal are *inapplicable* where the performance to be compelled is a Constitutional duty." 6 N.Y. Jur. 2d Article 78, §90:

(A) Because Respondent Judge Had an Interest in the Outcome of the June 2007 Proceedings, Statutory Disqualification Herein Rises to a Violation of Due Process of Law

It is beyond dispute "that an impartial [i.e., disinterested] decision maker is a core guarantee of Due Process," *1616 Second Ave. Restaurant, Inc. v. New York State Liquor*, 75 N.Y.2d 158, 550 N.E.2d 910, 551 N.Y.S.2d 461 (N.Y., 1990). In *Second Ave. Restaurant*, the Court held in that Article 78 decision: "Chairman's . . . failure to disqualify himself from that proceeding deprived the licensee of due process of law under the Federal Constitution. [Accordingly] . . . petition granted." (Id., at 160 - 166). Indeed, due process is always offended and disqualification "mandatory where there exists a direct, personal, [or] substantial interest in reaching a particular conclusion, or where a clash in judicial roles is seen to exist." *People v. Alomar*, 93 N.Y.2d 239, 246, 689 N.Y.S.2d 680, 711 N.E.2d 958 (N.Y. 1999).

Yet the Attorney General argues: "the existence of . . . adequate legal remedies bars any petition for Mandamus" and therefore the Appellants, "may move for vacatur [of the stipulation or] pursue an appeal if that relief is denied." This recommendation is followed decisional authority wholly indifferent to the instant facts:

Matter of State v. King, 36 N.Y.2d 59, 62 (1975) ("The extraordinary remedy will not lie if there is available an adequate remedy at law, of which appeal is but one . . ."); *Matter of Silverman v. Lobe*, 163 A.D.2d 62, 63 (1st Dep't 1990) (Mandamus is not appropriate where "there are other available adequate remedies").

* * *

As means to prevent an arrogation of power, when a "court acts without jurisdiction . . . in violation of a person's rights . . . *especially* constitutional rights [Mandamus] will lie. *National Equipment Corp. v. Ruiz*, 19 A.D.3d 5, 794 N.Y.S.2d 2 (1st Dep't 2005) It is not available "ordinarily as a method of premature appeal . . . where the lower court is exceeding its jurisdiction and the writ furnishes a more effective remedy, [Mandamus] may be availed of although the error might be corrected by appeal." *Matter of Lee v. County Court of Erie County*, 27 N.Y.2d 432, 437-438, 318 N.Y.S.2d 705, 267 N.E.2d 452 (N.Y. 1971).

So *adequate-remedy* is irrelevant. Legal alternatives will not "bar [a Mandamus suit] when the application involves questions concerning the performance of a Constitutional duty." *Pare v. Donovan*, 54 Misc 2d 194, 281 NYS2d 884 (Sup Ct., Kings Co., 1967). "The existence of an equitable remedy is no bar to the writ, although it may influence the court in the exercise of its discretion."

People ex rel. Frost v. New York Cent. & H.R.R. Co., 6 Bedell 187, 168 N.Y. 187, 61 N.E. 171 (N.Y.1901); see also, *Carmody's N.Y. Prac.* vol. 10, page 553. This principle has been upheld by no less authority than the U.S. Supreme Court. *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261 (1962).

Engle began a routine ". . . Article 78 proceeding, seeking an order in the nature of Mandamus directing the respondent Board of Education . . to discontinue use of [school] prayer." *Engel v. Vitale*, 18 Misc.2d 659, 191 N.Y.S.2d 453 (N.Y. Sup. Ct., Kings Co., 1959). The Petitioners—parents/taxpayers from a Brooklyn school—alleged that both the Establishment Clause and similar provisions of the State Constitution (N.Y. Const art I, §3) enjoined a mandatory performance by the school board. Waving the flag of "adequate remedy", the School Board pointed to Education Law §310: appeal to the Commissioner.

The initial dismissal was upheld by both the Second Department (11 A.D.2d 340, 206 N.Y.S.2d 183) and the New York Court of Appeals (10 N.Y.2d 174, 176 N.E.2d 579, 218 N.Y.S.2d 659 [1961]), only to be reversed by the U.S. Supreme Court. *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 86 A.L.R.2d 1285, 8 L.Ed.2d 601 (1962). However, at all levels of review, there was universal consensus that adequate remedy did not preclude Mandamus relief:

> That section [Education Law, §310] is not controlling in a proceeding in the nature of Mandamus . . . if a Constitutional issue is involved. [Cite omitted.]
> (*Engel*, 18 Misc.2d at 664.)

The same applies to New York's Constitution. Adequate-remedy barely resonates against the boundary behind which judges may sit only where they have jurisdiction or where "the legislature may provide that [other] courts shall have jurisdiction [over new classes of actions herein] such classes may be originated." (N.Y. Cont. art VI §7[b]). So by "securing litigants a fair and impartial trial by an impartial and unbiased tribunal [through §14]" (*Gilbert* [*supra*]), the Legislature predetermined that Constitutional questions inhere in any challenge of interest disqualification. *Riglander v. Star Co., 34 N.Y. Civ. Proc. R. 92, 98 A.D. 101, 90 N.Y.S. 772* (App. Div. 1st Dep't) *aff'd.* at 181 N.Y. 531, 73 N.E. 1131 (1905): "If a party is deprived any right usually accorded others it is not due process of law."

The Fourteenth Amendment's centrality to interest disqualification is axiomatic. "It certainly violates Fourteenth Amendment and deprives a [litigant] of due process of law to subject his [case] to the judgment of a court, the judge of which has a direct, personal, . . . interest in reaching a conclusion against him in his case." *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 50 A.L.R. 1243, 71 L.Ed. 749,

(1927). Even at common law in England, prior to the separation of colonies from the mother country . . . it is very clear that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject-matter which he was to decide, rendered the decision voidable." *Tumey* at 542. These corner stones of Anglo-American law developed, the Court noted, "as early as 12 Richard II, A.D. 1388." *Tumey*, at 441. Speaking for the Court thirty years after *Tumey*, Justice Black recognized that as ". . . a basic requirement of due process . . . no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955).[18]

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[18] In gauging where the instant facts might fall on an "interest" continuum, Justice Reed's dissent in *Murchison* is insightful. Parting from the majority as having traveled too far from *Tumey v. Ohio*, the minority objects:

> It is one thing to hold that a judge has too great an interest in a case to permit the rendition of a fair verdict when his compensation is determined by the result he reaches. It is quite another thing to disqualify a state judge as having too great an interest to render a due process judgment when his sole interest, as shown by this record, is the maintenance of order and decorum in the investigation of crime—an interest which he shares in common with all judges who punish for contempt. (*Murchison*, 349 U.S. 142).

As "decorum" interest isn't even remotely comparable to the kind of interest inherent in a law suit to which one is a *named* party, the instant facts rise far above *Murchison*'s "floor". In other words, the interest in *Murchison* was essentially intellectual: a judge vindicating his own prima facie findings of contempt or, in the words of the Court: "to act as a grand jury

Although Justice Black acknowledged such "interest cannot be defined with precision as circumstances and relationships must be considered" *ibid.*, nonetheless, a working formulation is: whether the "situation is on 'which would offer the possible temptation to the average . . . judge not to hold the balance nice, clear and true." See *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S. Ct. 80, 83, 34 L.Ed. 2d 267 (1972).

Broadening *Tumey*, the contemporary rule this disqualifies any "direct personal interest in the outcome of the hearing." *Ungar v. Sarafite*, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964). Synthesizing these holdings, *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 826, 106 S.Ct 1580, 1588-1589, 89 L.Ed.2d 823 (1986) holds:

> [A]s explicated in *Tumey*, *Murchison*, and *Ward*, we make clear that we are . . . required to only [ask] whether sitting on the case . . . "would offer a possible temptation to the average . . . judge to not to hold the balance nice, clear and true."
>
> *Ward*, 409 U.S., at 60, 93 S.Ct., at 83.

[footnote continued from previous page]

and then try the facie findings of contempt or, in the very persons accused as a result of his investigations." (*Id.*, at 137). Herein Respondent's interest is analogous (vindicating his take on CPLR §3011) but critically, it is also quasi-pecuniary: he is litigant.

Of course, some disqualification questions are not constitutional: the Fourteenth Amendment "establishes a constitutional floor, not a uniform standard." *Bracy v. Gramley*, 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997). Nonetheless, "the floor established by the Due Process Clause clearly requires a 'fair tribunal," before a judge with no interest in the outcome of his particular case." *Id.*, at 905.

Adequate remedy, then, is *non-sequitur*. The petition's §14 remedy is predicated on notions of Constitutional process: the State's concomitant duty to insure "every person's right to life, liberty and property be accorded the shield of inherent and fundamental principles of justice." *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 90 A.L.R. 575, 78 L.Ed. 674 (1934). [Cardozo, J]. The state must guarantee respect for those personal immunities "so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Ives v. South Buffalo Ry. Co.*, 201 N.Y. 271, 94 N.E. 431, 34 L.R.A.N.S. 162, (N.Y. 1911).

A Judge, then, may only sit "where jurisdiction is conferred by the Constitution, and upon no other tribunal; for otherwise there will be a failure of justice. (*Oakley v. Aspinwall*, [N.Y., 1850])." *Converse v. McArthur*, 17 Bard. 410 (N.Y. Sup Ct., 1854). The failure of justice results because the "provision of the statute, prohibiting any judge from sitting . . . is controlled by the Constitution, as the paramount law." *Re Leefe*, 2 Barb. Ch. 39, 5 N.Y. Ch. Ann. 548, WL 4195 (N.Y. Ch. 1846).

Accordingly "few situations are more appropriate for Mandamus than a Judge's clearly wrongful refusal to disqualify himself." *I.B.M. Corp., In United States v. I.B.M. Corp.*, 618 F2d 923 (C.A. 2nd Cir., 1980). And where the interest per se is the disqualifying factor, the Constitution is particularly offended. As the Court of Appeals ruled: "[M]atters of disqualification rarely rise to the Constitutional level or violate procedural due process, absente some interest of the Judge in the outcome of the proceedings . . ." (dissent, *1616 Second Ave. Restaurant, Inc. v. New York State Liquor*, 75 N.Y.2d 158, 550 N.E.2d 910, 551 N.Y.S.2d 461 (N.Y., 1990).

* * *

Dated: New York, New York
October 21st, 2009

ROBIN H. KYLE, ESQ.,
Attorney for Petitioners

APPENDIX M:

Correspondence of the Office of the State of New York State Attorney General to Supreme Court of the State of New York, Appellate Division—First Department

December 11, 2008

Honorable John McConnell
Court Clerk
Supreme Court—Appellate Division
First Department
27 Madison Avenue
New York, NY 10101

Re: *Matter of Kyle v. Lebovits*,
N.Y. County Index No. 110838/07

Dear Mr. McConnell:

The Honorable Gerald Lebovits, JHC, submits this letter to advise the Court of two errors in the Respondent's [Judge Lebovits'] brief, filed October 8, 2008. On page 8, Respondent states that the Tenants did not ask either Judge Lebovits or Judge Wendt to reconsider his ruling on the matter of attorney's fees. In fact, the Tenants apparently did move for re-argument to Judge Lebovits, which was denied on February 22, 2007 (see papers submitted by the Tenants on 11/4/08, 661.3).

Also on page 8, Respondent states that the Tenants commenced their Article 78 action "more than a year after the second of those orders was issued." This is incorrect: the Article 78 was filed approximately two months after the second of these orders was issued.

Wile Respondent notes these errors, their correction does not alter Respondent's argument in any manner.

Respectfully submitted,

DIANA R. WINTERS
Assistant Solicitor
General

cc: Robin H Kyle, Esq.
The Kyle Law Firm
80 Broad Street, 5th Floor
New York, NY 10004

APPENDIX N:

Housing Part: Civil Court of the City of New York
736 Riverside Drive LLC v. Kyle, et al.,
L&T 77281/06

June 4, 2007, July 8th, 2007
Transcript of Proceedings

THE COURT: Appearance please.

MR. McCOURT: Uh, for the petitioner [Heiberger and Associates] by - - New York, New York, 1 - - 6. *Judge, uh, there's a stay on this case, uh, pursuant to the order of Judge Went [phonetic (Cahn)] under Index Number 105603 of '07, um, which is on for 78 proceeding.* I just was informed from my client by e-mail that he spoke with Respondents' counsel and a settlement has reached—legal fees—prior action. Uh, I haven't reached the adversary. *But based on the—in light of the stay of this proceeding*, I don't think he would mind to just adjourn the matter?

THE COURT: To when?

MR. McCOURT: Uh, Your Honor, I - - this week - - two weeks?

THE COURT: No.

MR. McCOURT: Two weeks?

THE COURT: No.

MR. McCOURT: Do you want to mark it on the calendar?

THE COURT: Uh, I don't want to have a lawsuit—

THE COURT: I have my reasons for not wanting to have a lawsuit pending against me.

MR. McCOURT: I understand.

THE COURT: Uh, I want to resolve this lawsuit as quickly as possible. Um...

. . .

THE COURT: I have strong personal reasons why I don't want to have a lawsuit pending against me. I have enough lawsuits pending against me as it is. Uh, it's an occupational hazard that people sue me. But I say, "Enough's enough."

MR. McCOURT: Would you like me to see if we can get - - response counsel - - try to draft something up in the - -?

THE COURT: To settle the Article 78?

MR. McCOURT: To settle the Article 78 and the legal fees portion of their claim.

THE COURT:— That would be amazing if you could do that.

* * *

THE COURT: . . . I don't want to have a lawsuit pending against me.

MR. McCOURT: It's not you personally.

THE COURT: No, of course, not, It's not even me, because he got my name wrong.

MALE VOICE: [laughs]

THE COURT: He did. Um, I don't have a—don't have a middle name, I was born without a middle name. I don't feel particularly deprived. But he couldn't even get my name right.

MALE VOICE: Um, should I call him and read him the Riot [phonetic] Act and say he'd like to see us or...

THE COURT: Read him the Riot Act?

MALE VOICE: What would you like me to do?

THE COURT: How do you—how do you read the Riot Act to someone who, instead of, uh—
[Crosstalk]

MALE VOICE: —filing an appeal or saying to Judge Went, "Would you reconsider?" instead has

papers like this under Article 78 and huge chunks of it, instead of just giving a sentence, he'll bold it, italicize, and underline it? So I think that Mr. Heart [phonetic] needs a psychiatrist.

MALE VOICE: Understood.

THE COURT: And his client has a good malpractice claim against him. So how do I deal—and he's not even here right now. That's the sad part. Read the Riot Act to him?

MALE VOICE: Well, if you'd like to give him a call and read him the Riot Act.

THE COURT: I—

[Laughter]
THE COURT: I'm not going to read him the Riot Act. I think, uh—

MALE VOICE: I mean, I actually, said—
[Crosstalk]

THE COURT: I wouldn't even—I wouldn't even speak to him off the record.

MALE VOICE: I mean, I'm not too shocked that the Judge is filing the order to show cause - -. I said I don't see how this Court sits in judgment—
[Crosstalk]

MALE VOICE: —when he can easily just file - - proceeding with - -. But...

THE COURT: No, I don't blame Judge Cahn for—uh, for signing it. It's easier to sign it than to read this crap. The only way that he could have refused to sign it is if he had read it. And I wouldn't wish this on my worst enemy. Okay. So, yeah, if you want to have the case called sooner than later, then, yeah, that would be great. But, uh, I understand if that doesn't work out. 2:00 p.m.? What do you think?

MALE VOICE: Let me make a phone call. I don't want to waste the Court's time to push it to 2:00 p.m. if he's not going to be here. –

-

THE COURT: Okay. Thank you.

July 8th, 2007 Transcript of Proceedings

THE COURT: [Calling case number: 77281/06]: *736 Riverside against Kyle*. Well, Mr. Kyle, you seeking to undo the stipulation that you signed?

WILLIAM KYLE: Yeah, the—uh, uh, I'm sorry. The, uh, stipulation is void as against public policy. You cannot waive §234 counterclaims [before] trial.[The] statute says: "any waiver of this privilege shall be void as against public policy."

* * *

This [stipulation] is [void] because it involve[s] §14 of the Judiciary Act. I have a right to Mandamus under these facts, uh, because it—uh, it is a mandatory statute. - - This is flat out disqualification.

THE COURT: So when—when did you graduate from law school, Mr. Kyle?

MR. KYLE: Uh, I don't remember the year, '91-'92, I don't know. But just reading the statute, you cannot—

THE COURT: How many times did you take the bar exam?

* * *

THE COURT: Come on. Come on, right here. Raise your right hand.

THE COURT: Do you swear or affirm that the testimony you're about to give will be the truth, the whole truth, and nothing but the truth?

MR. KYLE: Yes, I do.

* * *

THE COURT: Okay. Uh, I would like everybody to step out for—for a few minutes. Thank you so much.

THE COURT: Except for you. Uh—

MALE VOICE: [Interposing] Can I leave my paperwork here?

THE COURT: Yes, please. Thank you so much. You don't have to—

THE COURT: —just—just not—just not over here. You're welcome to stay in the courtroom all of you. Uh, Mr. Kyle, everything you said so far is true?

MR. KYLE: Yes, I believe '89 University of Detroit. Uh, presently it's called University of Mercy and Detroit, something like that. They had a merger—

THE COURT: Even—even the Gulf War you got wrong by a couple of years.

MR. KYLE: . . . I'm not a historian. Anyway, I'm doing the best I can here.

THE COURT: Okay. Okay. ***So I'm going to treat you a little bit differently now***, uh, now that I see that you've made the obvious efforts [even though Kyle got the Gulf War wrong by a couple of years]. I—I—uh, I—I respect your educational background. And I respect you. Your motion, I have to say, is—is—uh, is a different story. I—I reject it entirely.

MR. KYLE: Okay.

THE COURT: ***I went out of my way, sir, to recuse myself.*** Even, uh, although the lawyers did not ask, I refused to sign the stipulation of—of discontinuance. I took that on my own. And for the stipulation of settlement, I went out of my way to say that ¶9 is not so ordered."

MR KYLE: . . . Now, once I realized that Ron—I'm going to get the transcripts from the hearing on the 15th and I'll see—but Mr. Hart was terrified that he was going to be the target of a grievance. So with that; he said:

> "I'm getting out of the Article 78."
>
> I said, "You get out of the Article 78. I'll do it *pro se*."
>
> He said: "No, if you [do it] *pro se*, they're going to come after me for having initiated [what] you continued. So, my butt's still on the line."
>
> So we argued back and forth. I said:
>
> "I just—I don't—I don't understand it. [The mandamus] is purely theoretical. I don't understand how anyone can [get upset about it]. But if you say [the judges are] upset about it, and [so] you can't handle it, and you don't want to be grieved, I'll do it."

THE COURT: When—when approximately did you take the New York bar exam?

THE COURT: I'm going to give you one chance to tell me the truth.

MR. KYLE: About what?

THE COURT: About your going to law school, about the bar exam, about your graduating, about the University of Detroit, about—um, about, um, Regions College.[19] And if you tell me the truth, I'm going to forget this whole episode. But if you don't tell me the truth, I'm going to look into it further

MR. KYLE: I think you should just "look into it further," except for dates.

---

[19] [sic.] Regent's College, London University.

APPENDIX O

PETITIONERS' REPLY CORRESPONDENCE TO JUDGE LEBOVITS' OPPOSITION CORRESPONDENCE TO MOTION FOR LEAVE TO APPEAL TO COURT OF APPEALS

March 22nd, 2009

Honorable John McConnell
Court Clerk
Supreme Court—Appellate Division
First Department
27 Madison Avenue
New York, NY 10101

Re: *Matter of Kyle v. Lebovits*, N.Y. County Index No. 110838/07

On Wednesday, March 18th, 2009, my office received a letter form the Office of the Attorney General in the above-captioned matter. Apparently the letter was in response to this "Court's inquiry" as to why the Attorney General failed to submit opposition papers to Petitioners' application for leave to appeal to the Court of Appeals, returnable February 26th, 2009. The substance and nature of this "inquiry" is unknown. If the "inquiry" was in writing, I have not been forwarded a copy of same; if

was it was done telephonically, there was no similar call to my office or message service.

* * *

Most importantly, the decision herein is clearly at odds with the U.S. Supreme Court's *Tumey v. Ohio*, line of decisions: *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, (1927); *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L.Ed. 942 (1955) and *Aetna Life Ins, Co,. v. Lavoie*, 475 U.S. 813, 828, 106 S.Ct. 1580, 1588 - 1589, 89 L.Ed.2d 823 (1886) to name a few.

Dated: March 21st , 2009
New York, NY

_____

Robin H. Kyle Esq.,

APPENDIX P

Petitioners' Application for Leave to Appeal
To the State of New York Court of Appeals

Kyle, et al., , *v. Lebovits, et al.,*
110838/07

June 2, 2009

Below, the Appellate Division's finding of an "adequate remedy at law" based on, *inter alia*, this Court's Due Process ruling in *Alizia, In re* (*supra*), undermines Petitioners' rights secured under the Due Process clause of the 14th Amendment to the United States Constitution. This issue has remained at the forefront of this proceeding, since Respondent's self declared strong personal interest in resolving a lawsuit against himself and in which both he and Petitioners were named parties.

The constitutional deprivation is compounded where, as here, the judge threatens Petitioners' counsel out of a legitimate cause of action and that legitimate cause of action is against—the judge *himself*. Accordingly, this Application For Leave (hereinafter Application) would vindicate Petitioners' 14th Amendment Due Process rights and uphold

the ancient common law maxim, *aliquis non debet esse judex in propria causa*: "no man shall be a judge in his own case."

Similarly, the Application would affirm the rule regularly invoked by this Court: "Next in importance to the duty of rendering a righteous judgment, is that of doing it in such a manner as will beget no suspicion of the *fairness and integrity* of the judge." *In re City of Rochester*, 208 N.Y. 188 (N.Y., 1913). This Application further seeks to vindicate New York's standing, among other jurisdictions, as a "liberal construction" state regarding disqualification statutes.

QUESTION PRESENTED

Respondent Judge refused to disqualify himself as to a stipulation he so-ordered in which both Judge and Petitioners were named parties . . . The question presented is whether Respondent Judge's failure to disqualify himself and the Supreme Court's refusal to issue the writ of mandamus for disqualification violated the Due Process Clause of the 14th Amendment?

* * *

This case easily falls within the recent "objective"/"potential for bias" disqualification standard set forth by Justice Kennedy in *Caperton v. A.T. Massey Coal Co., Inc*,. 129 S.Ct. 593 (Mem), 77

USLW 3292, 77 USLW 3295 (November 14, 2008) (NO. 08-22). Justice D. Benjamin, defeated an incumbent justice in an election with the generous assistance of Massey Coal Co., who contributed over 60% of Benjamin's campaign financing: $3,000,000. Massey Coal benefitted from Benjamin's refusal to recuse himself from Massey's appeal of a $50,000,000 judgment against it. Justice Benjamin casts the critical vote overturning the $50-million judgment against it. Even on re-hearing, after pictures emerged of Benjamin on vacation with Massey's CEO, he declined recusal.

The Supreme Court held Benjamin's refusal to recuse himself violated the Due Process clause of the 14th Amendment, because of he received substantial contributions from Massey. There are some circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be Constitutionally tolerable." *Caperton*, WL 1576573 at *6, citing *Winthrow* v. *Larkin*, 421 U.S., at 47, 95. The Supreme Court noted: the inquiry is an objective one and the Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias." Emphasis added; *id* at *9.

* * *

ARGUMENT

POINT I: RESPONDENT JUDGE'S REFUSAL TO DISQUALIFY HIMSELF VIOLATED THE DUE PROCESS CLAUSE

(A) Due Process Under the 14th Amendment

[U]nder *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S. Ct. 80, L. Ed. 2d 267 (1972), "a disinterested and impartial judicial officer as guaranteed by the Due Process Clause of the Fourteenth Amendment" is the *sine qua non* of due process.

Alizia follows the long line of cases equating "impartiality" with due process. As Petitioners' argued (Reply br. at p. 11): "It is beyond dispute that an *impartial* [i.e., disinterested] decision maker is a core guarantee of due process," *1616 Second Ave. Restaurant, Inc. v. New York State Liquor*, 75 N.Y.2d 158, 550 N.E.2d 910, 551 N.Y.S.2d 461 (N.Y., 1990). Reading the Bill of Rights through §14, the Second Circuit held: "Due process implies an *impartial* court, which is not provided if the judge has a direct . . . *interest* in the case." *Bradford Audio Corp. v. Pious*, 392 F.2d 67, 12 Fed. R. Serv. 2d 216 (C.A.N.Y. 1968).

U.S. Supreme Court decisions have consistently recognized "the due process requirement of an *impartial* tribunal." *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) (Pet. Reply br. at p.

16 -17); "The floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal,'" *Bracy v. Gramley*, 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) (Pet. Reply br. at p. 17); "The Due Process Clause entitles a person to an *impartial* and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico*, Inc., 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980).

Accordingly, due process violations may arise where a judge has been so personally "enmeshed in matters" concerning one party that he is biased against him. *Johnson v. Mississippi*, 403 U.S. 212, 215, 91 S.Ct. 1778, 29 L.Ed.2d 423 (1971). Petitioners argued (Reply br. at p. 15): "by securing litigants a fair and *impartial* trial by an *impartial* and unbiased tribunal [through §14]", the Legislature predetermined that Due Process questions inhere in any challenge of disqualification by interest. (*Gilbert*, 256 N.Y.S. at 444).

This line of decisions is the Constitutional precedent through which this Court resolved *Alizia*.

(B) THE RECORD IS REPLETE WITH "CIRCUMSTANCES THAT WOULD BRING RESPONDENT'S IMPARTIALITY INTO QUESTION"

. . . In *Alizia*, after the Bronx County Family Court adjudicated the appellant to be a juvenile delinquent, her mother was held in contempt. On

appeal, the mother argued [the court's] disqualification, however, this Court held:

> The court properly exercised its discretion in declining to recuse itself after it initiated a complaint against appellant and appellant's mother and sister for creating a violent courtroom disturbance. . . . The charges which arose from the disturbance were unrelated to the proceedings against appellant over which the court presided. Absent a legal disqualification under § 14, recusal is a discretionary decision within the personal conscience of the court (see *People v Moreno*, 70 NY2d 403 [1987]). In this case there are no circumstances that would bring the court's impartiality into question.
> (*Id.*, 25 A.D.3d at 430).

As neither *Alizia* or *Moreno* were Mandamus actions, and *Moreno* doesn't address "impartiality", *Alizia's circumstances-of-impartiality* can only be understood as Due Process impartiality—i.e., analyzed through the 14th Amendment. In the *Tumey/Alomar* decisions "impartiality" is the *sine qua non* of disqualification. In those cases, "interest" and "impartiality" are often two sides of the same Due Process coin.

Alizia's "circumstances" are clearly analogous to Justice's Brennan's "situations." *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S. Ct. 80, L.Ed. 2d 267 (1972). In Ward, "the test is whether the [judge]-mayor's *situation*":

> . . . is one "which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true . . ."
> (*Ward*, 409 U.S. at 60, citing *Tumey*)

In a word, *Alizia* simply restates *Ward*. Justice Brennan's "situations" (which would "offer a possible temptation to the average man as a judge not to hold the balance nice, clear, and true" [*Ward*]), are the "*circumstances* that would bring the court's impartiality into question" (*Alizia*). As Justice Brennan explained: such "temptation" exists when a mayor/judge's "executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." This, too: ". . . is a '*situation* [i.e., 'circumstance'] in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) necessarily involves a lack of due process of law" (*Id.*, 409 U.S. at 60).

Therefore, under *Alizia-Ward*: "a disinterested *and impartial* judicial officer [is] guaranteed by the Due Process Clause of the Fourteenth Amendment." *Ward*, 409 U.S. at 57. To the extent *Tumey* and *Ward* involve mayor-court circumstances, the instant record introduces a litigant-Judge. There is a bevy of indicia as to Respondent's adversarial/accusatory conduct, behavior more indicative of an aggressive litigant than the "impartial disinterested decision-maker" guaranteed

by Due Process under *1616 Second Avenue Restaurant*, (*supra*).

So contrary to what the First Department found below, *Alizia's circumstances-of-impartiality* test, requiring disqualification is easily satisfied on this record. If the record contained nothing else, Respondent Judge's having physically thrown the court file at Petitioners' counsel is so outrageous, it impugns Respondent' impartiality by itself [R. 315, lines 20 – 22; R.. 317, line 9; R. 333, lines 5 – 10]. That Respondent Judge did so after having already allegedly recused himself, further undermines both the IAS Court's analysis and the Appellate Division's dearth of reasoning or even discussion. Both decisions are written as if these facts and many other disqualifying *circumstances/situations* did not exist.

Respondent Judge characterized the Petitioners and their attorney of lying: He accused Petitioners' counsel of being a "liar" [R. 312] of being "slippery" [id]. And for no apparent reason accused Petitioner himself of lying even as everything Petitioner said turned out to be true:

> **THE COURT**: I'm going to give you one chance to tell me the truth.
> **MR. KYLE**: About what?
> **THE COURT**: About your going to law school . . . if you don't tell me the truth, *I'm going to look into it further*.

> **MR. KYLE**: I think you should just "look into it further," except for dates. [Supp-R. 553].

With no *conceivable* proof, Respondent accused Petitioner of perjury, conspiracy and, essentially, theft by altering the IAS Court: "That [Petitioners] "do not know what happened to the $190,000, even *if true*, is not grounds to vacate the stipulation. The court has *no doubt* [Petitioners] *have failed to disclose* something on this topic." [R. 232]. Short of out-right theft, he accused Petitioners of *attempted* theft: "[Petitioners] hope to get more money" [R. 224] and Petitioners' counsel of attempted theft: "[Petitioners] and new counsel . . . changed their mind [sic] to get more money now that [Riverside] has paid Kyle. . ." [R. 226]. "These observations also coming *post*-recusal.

Clearly, if Respondent Judge harbored these malignant sentiments toward Petitioners or their attorneys, not only is disqualification required, but Respondent's June 20th, 2007 recusal couldn't possibly purge conduct of pre-recusal non-impartiality.

Respondent placed the factually-impossible assertion into the record (and did not withdraw it before the IAS Court) that he was unaware of the stay of proceedings. [R. 110; lines 3 – 4.] On appeal, Respondent Judge failed to explain his irrefutable knowledge of the stay evidenced by: Riverside's counsel's having informed him of the stay twice on

the record, [Supp-R. 478 - 479]; Justice Cahn's notation of service on OSC cover page [R. 67]; and Respondent's deprecations over his mistaken middle initial on the OSC [Supp-R. 481; R. 113, lines 23 - 24].[20]

Respondent submitted his written opinions of law to the IAS Court in response to Petitioners' application. Respondent's submissions to the IAS Court contained the factually-impossible statement that Petitioners failed to move for rehearing [R.229 [top]; R 110 (bottom) - 111 (top) and Resp's Br., at p. 8].

Then, after leaving this materially erroneous statement uncorrected in the IAS Court proceedings which resulted in sanctions; and again placing the recklessly incorrect statement into Respondent Judge's brief before the Appellate Division; the Attorney General was finally forced to withdraw the allegation.[21] (**Exhibit "F"**). Notwithstanding the

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[20] Amazingly, the IAS Court imposed sanctions in part based on how the record "suggest Respondent Judge was not aware of the stay." [R. 19 - 20]. Yet not only does the records render Respondent's knowledge of the stay conclusive, it does so in the IAS Court's own hand writing: "*Ronald Hart, Esq., advises that the Attorney General has been advised of the time and place of this application.*" [R. 67].

[21] Respondent Judge's opinion submitted in response to this proceeding, stated in part:

> In the interim, and instead of appealing or moving to renew or reargue, respondents [Petitioners herein], by counsel, brought an Article 78 proceeding against Judge Wendt and this court to compel us to rule in their favor

Attorney General's written retraction, the Appellate Division refused to take judicial notice over Respondent's denial of rehearing **(Exhibit "H".)**

Respondent illegally threatened Petitioners' prior counsel with baseless sanctions and disciplinary reprisal if the Mandamus issues weren't "settled" [R. 110- 111]. Then, of course, on appeal never denied the threats were leveled without lawful foundation. [Resp. br., pp. 1 - 37]. Respondent never denied unlawfully presiding over Petitioners' rights three times *after* recusal and never justified it before the Appellate Division [Id., 1 - 37]. Respondent further confessed he had a "serious ethical conundrum" [R. 109, 126], then argued to the IAS Court that Petitioners' claim that he had just such a conundrum (conflict) was not only "frivolous" but "sanctionable" [R. 225].

Respondent summoned armed court officers to surround Petitioners' counsel for no other reason

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and award them hundreds of thousands of dollars in attorney fees. [R. 229.]

After this utterly preposterous statement was placed into the record by Respondent Judge and submitted in opposition to Petitioners' instant Article 78 litigation, it served as part of the basis of the IAS Court's imposition and sanctions. The Respondent Judge's absurd statement was not retracted by Respondent Judge until after it was again submitted by him in filings with the Appellate Division. [See Resps' Opposition br., at 1- 32] and **Exhibit "F"** attached.

than "in case you get out of line" [R. 312 line 20; R. 332 – 333; R. 31]; derisively warned Petitioners' attorney ". . . *you will answer yes or no. Or I will have a whole bunch of officers here and I will find out what's going on*" [R. 312]; barked orders such as "You will stand when you speak to the Court . . . Or that will be the last time you will be here." [R. 312]; allegedly recusing himself in June 20th, 2007 then apparently *un*-recusing himself a month later to preside over Petitioners' July 9th, 2007, OSC [R. 162, 223 -224], all the while haranguing Petitioners' counsel about his June 20th, 2007, recusal in *August*! [R. 310 – 320]:

THE COURT: [Calling] 736 Riverside Drive against Kyle—step up, Appearances.

MR. KYLE: For the Respondents, *Robin H. Kyle.*

THE COURT: Do you have a Notice of Appearance in the file, Mr. Kyle

MR. KYLE: I filed the motion; I don't have an appearance filed.

THE COURT: Are you appearing in this case?

MR. KYLE: Yes, Your Honor.

THE COURT: Then you will file a Notice of Appearance

MR. KYLE: I'm sorry.

The COURT: Then you will file a Notice of Appearance—

THE COURT: I have a Notice of Appearance on 77281/06. But I recused myself from that case. So why do I see it at all, Mr. Kyle?

MR. KYLE: I have not seen the order of recusal.

THE COURT: You will stand when you speak to the Court.

MR. KYLE: I apologize Your Honor. . .

THE COURT: Or that will be the last time you will be here.

MR. KYLE: I have not seen an order of recusal. I'm sorry.

The COURT: You don't even know about it? Do you—you have a client also by the name of Mr. Kyle?

MR. KYLE: I do.

THE COURT: Any relation to you?

MR. KYLE: Yes.

THE COURT: What?

MR. KYLE: Brother.

THE COURT: He didn't tell you that I recused myself?

MR. KYLE: He told me that there was no Order of Recusal. He said that you indicated on the record—

THE COURT: [interposing] There is no Order of recusal? What does that mean?

MR. KYLE: That there is no signed Order of recusal.

THE COURT: It wasn't enough that I issued it orally? Are you playing games with me? Are you trying to misrepresent the record?

MR. KYLE: Oh, I don't—

THE COURT: I told you, mister—and you will speak only after I have spoken and you will answer my questions that. I want to know if you knew that I recused myself, and so you, in a slippery way, say that you don't have a written Order of recusal. Does that mean you know that I recused myself, yes or no? And

you will answer yes or no. Or I will have a whole bunch of officers here and I will find out what's going on. Answer.

MR. KYLE: I don't understand the question. What do you mean?

THE COURT: Do you know that I recused myself, yes or no?

MR. KYLE: I know that you said that. [But I] don't know—

THE COURT: [interposing] So—so when you said that you didn't know that I recused myself were you lying to me? You were lying to me.

MR. KYLE: No that's—that's totally false. That is inaccurate and you are berating me just like you berated my predecessor—

THE COURT: [interposing] Okay.

MR. KYLE: Uh for reasons that are set forth—

THE COURT: [interposing] Sit.

MR. KYLE: That—

THE COURT: Sit.

MALE VOICE: Lieutenant, this is Mike in Part "O", can you send two officers up here?

THE COURT: In case you get out of line.

MALE VOICE: —send two officers up here. All right? Thank you.

THE COURT: Have you ever been held in contempt before?

MR. KYLE: Never, Your Honor. I've been practicing law—

THE COURT: [interposing] Okay well you don't want this to happen to you for the first time. Okay.

MR. KYLE: I have never—

THE COURT: [interposing] You will speak when I speak to you and not otherwise. Do you understand me?

MR. KYLE: I do.

THE COURT: Good. Now I'm going to ask the question again, do you know that I recused myself in 77281 of '06?

MR. KYLE: I know that you said on the record that you were going to recuse yourself.

THE COURT: That I was going to recuse myself?

MR. KYLE: I'd have to look at the record to recall exactly what you said. The record, as you know, is very voluminous. But I recall reading in a transcript where you said that you were going to.

THE COURT: And then I sent the case to Part X. look at the front of the file and tell me whether that's not a written Order on the file recusing myself.

MR. KYLE: You're talking about the jacket?

THE COURT: I am.

THE COURT: I haven't seen the jacket before—for the record. And that's not a lie and I haven't said anything to the Court that is untrue or with the intention of misleading the Court

THE COURT: Do you see it at the bottom?

MR. KYLE: *Court*, . . . and I think it's: *Lebovits, recuses itself because of*—I can't read that word. And it looks like: *78US—Lebovits*

THE COURT: I'll right. I'll read it for you. May I have it back, please?

MR. KYLE: I want the record to reflect that the file was essentially thrown at counsel's desk by Your Honor.

THE COURT: "I recu—Court Lebovits, in *paren.*, recuses itself because of *paren.*, discontinued, close paren., Article 78 verses Lebovits and Wendt. Okay. So now that I have recused myself, that you very much

* * *

MR. KYLE: . . . And if you read the file, my understanding is of the rule, and

you have recused yourself, then what you do is it goes for a reassignment where it sits somewhere else.

THE COURT: Mm hmm.

MR. KYLE: Uh, because that's where the matter had been sent as I think Your Honorable just said on the record

THE COURT: Okay.

MR. KYLE: So apparently uh you are proceeding on the case even though you have recused yourself. Because I filed a Motion. Am I correct?

THE COURT: I get to ask the questions. You get to give the answers.

* * *

MR. KYLE: So, . . . I do have a question: Is Your Honor, has recused itself, or the Court has not recused itself?

THE COURT: On 77281 of '06, yes. I signed the stipulation though in 68658 of '03. We could talk about that index number That's the one in which I signed the stipulation, right?

MR. KYLE: Well, the stipulation, Your Honor—

THE COURT: [interposing] Take a look. Take a look. It's your exhibit—

MR. KYLE: I'm looking at it. I'm looking at it Your Honor. And the stipulation has three index numbers on it. And the stipulation makes reference to all of the index numbers that are referenced on the first page of the stipulation. And my Notice of Motion admittedly has the index number 77281/06, but the

Supporting [Affirmation]—on the very next page has the other index numbers, namely, 105603/07, 66 I'm sorry, 68658/03 and 77281/06. So, respectfully I just—I don't know where we're going with this, uh, colloquy about the index numbers.

THE COURT: Don't I have the right to know what you're asking for?

MR. KYLE: I—I think you do have a right to know what I'm asking for. I'm just having trouble understanding your misunderstanding that where the ambiguity is—

THE COURT: [interposing] don't—don't tell me that—

MR. KYLE: — in what I'm asking for.

THE COURT: Don't tell me, Mister, that I have a misunderstanding. Okay?

MR. KYLE: You said that, Your Honor, I didn't say that.

THE COURT: Don't accuse me of anything.

MR. KYLE: Well, uh—

THE COURT: [interposing] I did not speak to you.

MR. KYLE: You did. You did—

THE COURT: I am telling you that—

MR. KYLE: You did speak to me.

THE COURT: That is—that is an Order. Okay?

MR. KYLE: I can't understand: what's "the Order"?

THE COURT: Don't accuse me of anything. Okay. What is your argument?

MR. KYLE: Well, I think you should disqualify yourself right now because you said "Don't accuse me of anything" and if you've had the time to read this motion, I accuse you of a lot of things. And I have done that in writing. So I'm in violation of your Oder before you issued it. And I don't think that, respectfully, it's a valid Order anyway. If you violate the law or if you, uh, apply the law incorrectly, uh, in representing my client I have not only a right but a duty to make that argument. And that's the argument I'm making this morning.

* * *

THE COURT: Okay on which case do you think there was a Stay?

MR. KYLE: 77281/06

THE COURT: All right.

MR. KYLE: The—the number that you read was the—the [mandamus]—

THE COURT: [Interposing] that was the one on which I recused myself and didn't participate.

MR. KYLE: You didn't participate in which proceeding?

THE COURT: 77281 of '06.

MR. KYLE: So you've recusd yourself in only one of the three index numbers, is that right?

THE COURT: How do you reconcile this issue? Your client, and I'm sure that he will tell you this, came to be with a Stipulation and asked me to sign it, by Mr. Hart. So—

MR. KYLE: I—I don't think that's born out in the record. I mean that's—that's a selective and inaccurate statement.

THE COURT: [Hart] did not come to me with a Stipulation? Did not come to anyone with a Stipulation?

MR. KYLE: Apparently the way I read the record you ordered them to settle the case. And you—you indicated as much on the record, And you indicated on the record that you were being asked to help resolve the case, although my conversations with Mr. Hart indicate that he didn't ask you to do that. And if Mr. McCourt asked you to do that he did it in violation of the Supreme Court Stay.

THE COURT: Okay, I'm sorry that if you believe that, I'm sorry that you believe that. Okay. What else?

* * *

THE COURT: Why do you want to vacate the stipulation?

MR. KYLE: Because it is illegal. It is void. It was not entered in my client's interest.

THE COURT: Your client was happy with it at one time.

MR. KYLE: My client was—what makes the Court say he was happy? I don't see him saying he's happy anywhere in this record.

THE COURT: He was in court when everyone signed it.

MR. KYLE: Right. After [Hart] was threatened with disciplinary proceedings by Your Honor—.

THE COURT: [Interposing] Your client was not threatened.

MR. KYLE: No, his lawyer was threatened with disciplinary proceedings by Your Honor. Can we agree on that much?

THE COURT: No.

MR. KYLE: Okay.

THE COURT: Of course not.

MR. KYLE: Well, you know I—the record is that the record is. I mean you said: "I'm thinking about filing disciplinary charges against you—I'm paraphrasing but the actual language is in

the record and –and it's quoted in the papers that I have filed. I mean that sounds like a threat to me

THE COURT: All right, well—

MR. KYLE: So I mean—so he's advised by his lawyer that hey you know: my law practice is going to be ruined, I'm being threatened wit disciplinary proceedings, by the Court. [Hart] went to a well-known [ethics professor]—

THE COURT: [Interposing] Okay show me where it says in the record, word for word, that I am not threatening him with a disciplinary issue. I'm pretty sure I said that. Ah, Exhibit "F". . . Well, so it's page four, 12 and 13: *I am not—I have no intention of filing disciplinary charges against you. Okay? Mr. Hart: Okay, right. The Court: You good with that?*

* * *

MR. KYLE: Okay the part that you didn't read into the record, Your Honor, is where you say: *I think your lawsuit, the [mandamus] is frivolous because I think your lawsuit is sanctionable. And I think that your lawsuit could lead you to go to the disciplinary*

committee and yet I'm thinking about filing a disciplinary charges against you personally. I wonder, frankly—frankly if you're capable of doing this, what else you're capable of. So I essentially trust you not and I don't trust you even a little bit. Okay? Have you heard me loud and clear?

Now that language by the Court sounds like a threat to me. Okay? Now, after you succeeded in getting Mr. Hart to settle a counterclaim for attorneys fees that had been stayed by the Supreme Court—

THE COURT: [Interposing] Why did—why did I care about that? Why would I, in a million years, have wanted that to be settled, or care whether it was settled?

MR. KYLE: Because it was the issue—the etiology of the [mandamus] proceeding. That's what the [mandamus] proceeding was all about. And once you moot that [fees] issue there isn't much left of the [mandamus] proceeding. And yet my client is sitting here without a lawyer. He doesn't get his Stay that is mandated by CPLR §321(c), which says that no proceedings may

be taken against a party who's attorney has been removed or disqualified for any reason. And you must give notice, not only to the other side, but you have to give notice to the party who's attorney is disqualified, and you have to tell them that they have at least 30 days to get an attorney.

Mary Kyle was not in court on that date and neither was Kathryn Gilbert, and the Order say absolutely nothing about them receiving notice that they are to appoint a new attorney. The Order says absolutely nothing about them or whatever. All it says and it short-changes what is supposed to be a [CPLR §321(c)] Stay.

THE COURT: Are you representing anybody else other than William Kyle?

* * *

MR. KYLE: Um so you have not only a violation of CPLR §321(c) in that respect, but the Court then takes action in the case, sending it to Part X as I think you indicated you did. And you can't do that—

THE COURT: [Interposing] But—but the proc—but the [mandamus] was withdrawn

MR. KYLE: It doesn't matter—

THE COURT: I recused myself, sent it to Part X, adjourned the case—

MR. KYLE: [Interposing] Which you shouldn't have done.

THE COURT: I shouldn't have done that either?

MR. KYLE: No. You shouldn't do anything once you have caused his attorney to have—to be removed [per [CPLR §321(c)]. . .

THE COURT: All right. All right.

MR. KYLE: —from my reading of the record, you participated in fully. I mean you state on the record: *Mr. Hart you told me last week this case was going to be settled.* [Hart] says: *No, I didn't.* I wasn't there and apparently [it] was not on the record; it was in the hallway or wherever it occurred—or on the phone. And so I don't know what happened. All I know is what I read in the record. So you should not have sent the matter to Part X.

And if you recuse yourself then I think you're done. But we're here now at a hearing. You've called one, two—at least two officers up here, for what I have no idea, except that you think you're going to intimidate me, and I can assure you you are not. You threw a file at me.

THE COURT: There we go.

MR. KYLE: That happened. You—you're not denying that that's what you did?

THE COURT: Okay.

MR. KYLE: Okay.

THE COURT: Do you have anything else to say?

* * *

THE COURT: I'll hear from [landlord's] counsel.

MR. EHRLICH: . . .We did not submit any opposition papers . . .

MR. KYLE: . . . Do we need to go back to Part X today, Your Honor.

THE COURT: Is this case on for trial today?

MR. EHRLICH: Well the case was referred out to Part X but now that there is a motion pending.

MR. KYLE: I thought Your Honor said you sent it to Part X

THE COURT: I did. For—for today, for trial. Are you ready for trial?

MR. EHRLICH: I'm not, Your Honor. Because we were served with a motion and we though we would need to deal with the motion before we dealt with any other issue at this time.

* * *

MR. KYLE: Can we go off the record?

THE COURT: Certainly not. Not without the other attorney here.

MR. KYLE: Well, I'll say it on the record. You—[have got at least] one court officer, in fact you need a single court officer for me. If you told me to go to jail, I would go.

THE COURT: You're—we thank you very much.

MALE VOICE: Thank you. Have a good day.

MR. KYLE: Thank you, Officer.

MALE VOICE: Have a nice day.

MR. KYLE: You too.

THE COURT: You're not going to jail.

MR. KYLE: That's a relief.

* * *

MR. EHRLICH: I'm just wondering what the posture of the motion is now.

THE COURT: Submitted.

MR. EHRLICH: Okay. I haven't submitted opposetion papers. I had an application on that.

THE COURT: Oh uh, I can't tell you whether it's needed or it's not needed. But I plan to decided the case. I'm just trying to figure out the date for trial.

MR. KYLE: And are you—is he going to be given an opportunity [to oppose?] and [if so] [we] want to [know] whether [we] can file a reply?

THE COURT: I plan to decide the motion.

MR. KYLE: When? I mean were you giving—

THE COURT: Soon, soon, soon.

MR. KYLE: Okay. I mean it was filed some time ago. I'm not saying that he should [not] be given additional—

* * *

THE COURT: Compromise folks. I'd hate to think that we had the most contentious litigation in this proceeding over the adjourn [trial] date. There are other issues in this case to worry about.

MR. KYLE: Well, we can try it today.

MR. EHRLICH: We're not prepared today.

MR. KYLE: Well, you know this was the trial date so I mean—I don't think—

MR. EHRLICH: And you filed a motion on the trial date.

THE COURT: Folks, folks, folks.

MR. KYLE: A motion you have not responded to.

MR. EHRLICH: Returnable on the trial date.

MR. KYLE: You have not responded to the motion.

MALE VOICE [WILLIAM KYLE]: First week in October, guys.

MR. KYLE: I don't know that that works. I mean I—you know I just don't know that that works.

THE COURT: What does it take? It's a simple non-pay [non-payment proceeding].

MR. EHRLICH: I understand that.

MR. KYLE: Well, if it's so simple let's do it now.

MR. EHRLICH: Your Honor, I have a hearing in front of judge [unintelligible] this afternoon. I don't know if my client is available to come down this afternoon. Maybe Mr. McCourt could come down but I don't know, He was stuck in Queens this morning. I'm not sure.

* * *

(D) Respondent's Having Threatened Petitioners' Counsel with Disciplinary Reprisal if the Mandamus filed Against Him Was Not "Settled" Deprived Petitioners of Due Process of Law

It is difficult to imagine a more consummate denial of Due Process than a judge—using the prestige of his office—threatening a party's attorney into discontinuing a perfectly legitimate claim, especially when the claim is against the judge. As the Appellate Division held: a judge "must lean over backward and error on the side of making sure that he does not intimidate the parties from pursuing legitimate claims . . . " *Matter of Mertens*, 56 A.D.2d 456, 392 N.Y.S.2d at 868 (App. Div. 1st Dep't 1977).

The concerns addressed in *Mertens*, *supra*, are casts in exclusively traditional Due Process analysis:

> But a judge is a judge; not a prosecutor or an investigator. He may not act on suspicion. He must maintain an atmosphere of impartiality, and be *impartial*, even though his suspicions have been aroused. Parties must feel that if they have a claim, the judge will listen to it *impartially*.
> (Emphasis added; *Id.*, 56 A.D.2d at 466).

Respondent's non-impartiality as to his own law suit is understandable. But as stated earlier [p. 17 - 18 (*supra*)], the link between a litigant/party-to the stipulation and disqualifying interest was forth by this Court in *Matter of Rochester* (*supra*): The common council is not the impartial and disinterested tribunal which the Legislature is bound to provide [because] the city of Rochester is a *party to the proceeding* [and] the common council [is] bound to

protect [the city's] *interest*." Disqualifying interest necessarily inheres, therefore, within any litigant-party status as one cannot be both *interested* litigator and "*dis*interested tribunal" as a party/litigant.

Respondent's predicament was dramatized on June 4th, 2007, when he announced: *Uh, I want to resolve this lawsuit as quickly as possible. I have strong personal reasons why I don't want to have a lawsuit pending against me.* In a long line of decisions—beginning with *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, (1927)—the Supreme Court has held that "a basic requirement of due process [is that] no man is permitted to try cases where he has an *interest* in the outcome." *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L.Ed. 942 (1955). See also *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828, 106 S.Ct. 1580, 1588-1589, 89 L.Ed.2d 823 (1986).

Indeed, the Supreme Court's due process *Tumey* decisions are mirrored in this Court's *Alomar* cases. Under *Alomar*, due process is always offended and disqualification "mandatory where there exists a direct, personal, [or] substantial interest in reaching a particular conclusion, or where a clash in judicial roles is seen to exist." *People v. Alomar*, 93 N.Y.2d 239, 246, 689 N.Y.S.2d 680, 711 N.E.2d 958 (N.Y. 1999).

Herein, the "clash in judicial roles" is inescapable: when Respondent threatens baseless grievance proceedings and warns "I have instructed my attorney to go full blast in defending me in the

litigation" [R. 111], Respondent's role was that of litigant, but played simultaneously with his *judicial* role—a result impermissible under *Almoar*, *Tumey*, §14, the 5th and 14th Amendments to the U.S. Constitution and N.Y. State Const. art. 1 §6.

POINT III: THE APPELLATE DIVISION'S FINDING AN "ADEQUATE REMEDY AT LAW", THEREBY REJECTING CLAIM THAT MANDAMUS SOUGHT COMPLIANCE WITH A CONSTITUTIONAL DUTY), CONSTITUTES AN ABUSE OF DISCRETION AS A MATTER OF LAW

Below, the Attorney General argued: "the existence of . . . adequate legal remedies bars any petition for Mandamus." Therefore, the Appellants, "may move for vacatur [of the stipulation or] pursue an appeal if that relief is denied." (Resp's br. At p. 20). Petitioners countered with the ancient black letter principle: "The CPLR provisions that an Article 78 proceeding must not be used [if] a determination can adequately be reviewed by appeal are *inapplicable* where the performance to be compelled is a constitutional duty." 6 N.Y. Jur. 2d Article 78, §90. [Pet. Reply br. at 11 - 19]. And Respondent's disqualification was a constitutional duty.

From *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927) to *Aetna Life Ins. Co. v.*

Lavoie, 475 U.S. 813, 828, 106 S. Ct. 1580, 89 L. Ed.2d 823 (1986), due process is always offended and disqualification becomes "mandatory where there exist a direct, personal, [or] substantial interest in reaching a particular conclusion, or where a clash in judicial roles is seen to exist." *People v. Alomar*, 93 N.Y.2d 239, 246, 689 N.Y.S.2d 680, 711 N.E.2d 958 (N.Y. 1999). A "*clash in judicial roles*" may be corrected on appeal (i.e., an "adequate remedy"), but "where the writ furnishes a more effective remedy [Mandamus], may be availed of although the error might be corrected by appeal." *Matter of Lee v. County Court of Erie County*, 27 N.Y.2d 432, 437 - 478, 318 N.Y.S.2d 705, 267 N.E.2d 452 (N.Y., 1871).

Legal alternatives will not "bar [Mandamus] when the application involves questions concerning the performance of a Constitutional duty." *Pare v. Donovan*, 54 Misc 2d 194, 281 NYS2d 884 (Sup Ct., Kings Co., 1967). This principle has been upheld by no less authority than the U.S. Supreme Court. *Engel v. Vitale*, 370 U.S. 421, 82 S.Ct. 1261 (1962).

POINT V: THE DENIAL OF THE NON-PARTY APPEAL AS TO "SANCTIONS" CONSTITUTES AN ABUSE OF DISCRETION AS A MATTER OF LAW WHEN THE CORE ALLEGATIONS OF THE PETITION—I.E., DISQUALIFICA TION BY PARTY/INTEREST STATUS UNDER §14—ARE UNDENIED BY THE PARTIES SEEKING SANCTIONS

* * *

Herein, Petitioners' "materially false statements" were effectively admitted by Respondents. And no false "materially false statements" are cited by the sanctioning Court, Respondent Judge, co-Respondent Riverside LLC, the Attorney General, nor the Appellate Division.

Where facts (alleged to have been "frivolously" asserted on one hand) are then *admitted* by the very litigants seeking to impose sanctions on the other, and the petition is dismissed on *legal insufficiency*—not after fact finding—an appellate court should exercise its discretion in the interests of justice.

Respectfully Submitted
ROBIN H. KYLE, ESQ.,

APPENDIX Q:

State of New York Court of Appeals

In the Matter of William KYLE, et al., Appellants,
v.
Hon. Gerald LEBOVITS, et al., Respondents

June 19, 2009

RESPONDENT HON. GERALD LEBOVITS, JHC'S MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' APPLICAITON FOR LEAVE TO APPEAL

* * *

Notwithstanding the Tenants' contention, the United States Supreme Court's recent decision in *Caperton v. A.T. Massey Coal Co.*, No 08-22, 2009 U.S. LEXIS, 4157 (Jun 8, 2009), decided well after the First Department ruled here, has no bearing on this case. In *Caperton*, a West Virginia Supreme Court of Appeals Justice presided over the appeal of a coal company from a jury verdict against it—ultimately taking part in the decision to reverse the verdict—after receiving a large amount of campaign contributions from the appellant coal company's chairman and principal officer. The Court found that in this "extraordinary situation," there was a "serious

rick of actual bias," and due process required recusal. *Id.*, at *29, *33.

This case presents no similar facts from which to infer a serious risk of actual bias. Judge Lebovits had no interest in the Housing Court proceeding before him, and did no so-order the stipulation of discontinuance for the Article 78 proceeding against him. And, as stated below, to hold otherwise would allow litigants to contrive a judge's removal by the filing of a mandamus proceeding.

Dated: New York, New York
June 19, 2009

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of the State
of New York
Attorney for Respondent the
Honorable Gerald Lebovits, HJC

Appendix R:

SUPRME COURT OF THE STATE OF NEW YORK: COUNTY OF NEW YORK

In the Matter of the Application of: WILLIAM KYLE, et al., *Petitioners,* —against— HON. PETER M. WENDT, JHC, HON. GERALD A. LEBOVITS, Et al., *Respondents*	Index No.: 105603/07 **STIPULATION OF SETTLEMENT "So-Ordered"** /_____ **Hon. Gerald Lebovits** *(exceptfor¶9; not so-ordered, G.L.)*

—*and*—

COURT OF THE CITY OF NEW YORK COUNTY OF NEW YORK: HOUSING PART

HUDSON OVERLOOK, LLC., *Petitioner,* —against— WILLIAM KYLE, KATHRYN GILBERT, and MARY KYLE *Respondents.*	Index No.: 68658/03

—*and*—

736 RIVERSIDE DRIVE LLC., *Petitioner,* —against— WILLIAM KYLE, KATHRYN GILBERT, and MARY KYLE *Respondents.*	Index No.: 77281/06

IT IS HEREBY STIPULATED, CONSENTED, AND AGREED to by and between the undersigned, the attorney of record for above named Plaintiffs-Petitioners, **William Kyle, Mary Kyle, & Kathryn Gilbert,** and the attorney of record for all of the above named Respondents-Defendants—736 Riverside Drive LLC, that the issue of outstanding Attorneys fees is resolved as follows:

1. Parties consent to the jurisdiction of this court.

2. Any and all claims for Attorney fees and costs by Respondents to date, including but not limited to those under the above referenced index#: **68658/03** shall be settled in the amount of **One Hundred and Ninety Thousand Dollars ($190.000.00).**

3. This settlement also covers legal fess [sic] to date under the current index# 77281/06.

4. Attorney's legal fees as specified in the above settlement shall be paid by 5:00pm Friday, June 29, 2007.

5. Ronald Paul Hart, Esq., attorney for the Respondents/Defendants [sic] further agrees not to represent any additional new tenants in the subject building (736 Riverside Drive, New York, New York) against the landlord under the current index **77281/06**, the old index number **68658/03**. Or

any new index number: including but not limited to **64846/07.** [sic].

6. Ronald Paul Hart, Esq., attorney for the Respondent/Defendants with the consent of the Respondents withdraws from representing the Respondents, **William Kyle, Mary Kyle, a.k.a Mary Nikitin, & Kathryn Gilbert,** under index number **77281/06,** and **68658/ 2003** or any new index number in the future, including but not limited to **64868/07.** [sic].

7. The Respondent, William Kyle, elects to proceed **Pro Se** in this matter and/or shall have until July 16th, 2007, to obtain new counsel if he so chooses. Matter 77281/06 adjourned to 7/17/06 [sic] for trial.

8. ¶'s 5 & 6 shall not be enforceable by any *successor-in-interest* unless managed by Solar Realty Man.

9. *William Kyle et al v. Wend, JHC Lebovits JHC,* and *736 Riverside Drive LLC,* (New York County Index No. 105603/2007) is hereby discontinued with prejudice.

10. ["¶7"] This agreement may be signed I n whole or in counterparts and copes/facsimiles of signatures on this document alone shall be deemed original.

11. ["¶8"] Landlord may file this agreement with the above-mentioned courts as proof of the terms stated herein.

Dated: New York, New York
June 20th, 2007

Ronald Paul Hart, Esq.	Lawrence McCourt Esq.
William Kyle	Petitioner-Landlord By: Dundar Polat

APPENDIX S:

Supreme Court of the State of New York

In the Matter of William KYLE, et al.,
Petitioners,
v.
Hon. Gerald LEBOVITS, et al., Respondents

August 30th, 2007

RESPONDENT HON. GERALD LEBOVITS' DECISIONS SUBMITTED IN OPPOSITION TO DISQUALIFICATION MANDAMUS

Notice Pursuant to CPLR §7804(i)

PLEASE TAKE NOTICE that pursuant to Civil Practice Law and Rules ("CPLR") §7804(i), Respondent, the Honorable Gerald Lebovits, Justice [sic] of the State of New York Housing Court [sic], elects not to appear in the above-captioned proceeding, and respectfully refers the Court to the August 24, [and 13th] 2007 Decision[s] and Order[s] which [are] annexed hereto and which address[ ] the issues presented to this Court by Petitioners.

Dated: New York, New York
August 30, 2007

ANDREW M. CUOMO
Attorney General of the
State of New York